No. 83 -

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

83-5836

ROBERT LEE WILLIE,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

Appendix

consideration than as a consideration bearing on guilt or innocence.[2]

Since I view *Burch* and *Ballew* (as did the three dissenters in *Brown*) not as a complete rejection of the reliability of five-person juries, but rather as a determination of the point where the "line drawing" for jury size should occur, I would not prohibit the state from using the earlier convictions in order to enhance relator's sentences.

STATE of Louisiana

v.

Robert Lee WILLIE.

No. 81-KA-0242.

Supreme Court of Louisiana.

Jan. 25, 1982.

Rehearings Denied March 19, 1982.

Defendant was convicted before the Twenty-Second Judicial District Court, Parish of Washington, Hillary J. Crain, J., of first-degree murder and was sentenced to death, and he appealed. The Supreme Court, Dennis, J., held that: (1) refusal to change venue was not error; (2) per se rule against further police-initiated custodial interrogation after request for counsel was inapposite to situation in which state officers interviewed defendant at jail about state offenses six days after he refused to answer FBI agent's questions about unrelated federal crimes without lawyer being present; (3) evidence sufficiently established corpus delicti so as to permit defendant's confession to be admitted into evidence; (4) remand was required for determination whether undisclosed note, used as evidence or otherwise at trial, or further evidence gained from note's inspection and analysis, would create reasonable doubt as to defendant's guilt; (5) argument, in which prosecuting attorney asked jury to assume that defendant would be pardoned or have his sentence commuted in considering whether he should live or die and in which prosecuting attorney inaccurately stated that a future governor considering defendant's application for pardon or commutation would more than likely not know the facts of the case and that a life sentence never exacted lifetime imprisonment, was error requiring that sentence be set aside and a new penalty hearing be held; and (6) another argument during penalty phase was misleading and improper.

Conviction conditionally affirmed; sentence vacated; remanded.

Lemmon, J., concurred and assigned reasons.

Marcus, J., concurred in part and dissented in part and assigned reasons.

Marcus and Watson, JJ., would grant state's application for rehearing only.

Watson, J., concurred in conditional affirmance of conviction, but dissented from reversal of sentence.

1. Criminal Law ⇐126(1)

Relevant factors in determining whether to change venue include: nature of pretrial publicity and degree to which it has circulated; connection of government officials with release of publicity, length of time between dissemination of publicity and trial; severity and notoriety of offense; area from which jury is to be drawn; other events occurring in community and affecting or reflecting attitude toward defendant; factors likely to affect candor and veracity of prospective jurors; degree to which publicity has circulated in areas to which venue could be changed; care exercised and ease encountered in jury selection; familiarity with publicity and its resultant effect on jurors; and peremptory challenges for cause exercised by defendant. LSA-C.Cr.P. art. 622.

2. The relators in this offense are fourth offenders challenging only one prior conviction.

2. Criminal Law ⇐1139

Though trial court possesses broad range of discretion in ruling on motion for change of venue in criminal proceeding, Supreme Court is required to make independent evaluation of facts to determine whether accused has received fair trial, unfettered by outside influences. LSA–C.Cr.P. art. 622.

3. Criminal Law ⇐126(2)

In proceeding in which defendant was convicted of first-degree murder and was sentenced to death, refusal to change venue was not error under circumstances under which only ten of the prospective jurors had formed opinion as to guilt or innocence, under which each selected juror's qualifications met minimum requirements, under which extent that governmental officials were responsible for publication of objectionable matter was minimal, under which, though crime was vile and outrageous and was thoroughly covered by news media, it was not attended by other inflammatory factors and under which both defendant and victim were of same race and were not residents of parish in which trial was being held. LSA–C.Cr.P. art. 622.

4. Jury ⇐131(13)

Burden is on defendant to show that court has misused its discretion in refusing to sequester venire during voir dire. LSA–C.Cr.P. arts. 784, 784 comment, 786.

5. Jury ⇐131(13)

In first-degree murder prosecution in which individual questioning of prospective jurors was permitted, trial court's denial of motion for sequestration of jurors during voir dire was not shown to have been misuse of discretion. LSA–C.Cr.P. arts. 784, 784 comment, 786.

6. Criminal Law ⇐590(2)

In first-degree murder prosecution, refusal to grant continuance four days before trial was not shown to have been abuse of discretion under circumstances under which, though defense counsel received amended discovery responses only four days before trial and was notified only one month before trial that state would definitely try the murder case on that date, it was not established that counsel was prevented from making adequate preparation for trial. LSA–C.Cr.P. art. 712.

7. Criminal Law ⇐641.12(2)

In first-degree murder prosecution in which defendant moved to have himself transferred from federal penal facility to either of two jails four days before trial and during trial to facilitate assistance of defense counsel, trial judge's decision to have defendant made available to counsel at the federal facility and to arrange for further conferences if necessary before defendant was returned to such facility on days during the trial was reasonable and a proper exercise of judge's discretion.

8. Criminal Law ⇐655(4)

Trial judge's remarks, during voir dire in criminal proceeding, that "Now if the state does prove in presenting their case guilt in your mind beyond a reasonable doubt, then you would legitimately expect something else, but it all depends on the state's proof, not on what the defense puts up * * * what you weigh is the state's evidence * * * if * * * they have failed to prove something that is necessary in order to obtain guilt, then at that time the defense has the right not to put on anything * * *," would not have been considered, by an average juror, as referring to defendant's failure to testify. LSA–C.Cr.P. art. 770.

9. Criminal Law ⇐412.2(2)

Prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of defendant unless prosecution demonstrates use of procedural safeguards effective to secure privilege against self-incrimination; unless other fully effective measures are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, a person must be informed, prior to any question, that he has right to remain silent, that any statements he does make may be used in evidence against him and that he has right to pres-

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ence of attorney, either retained or appointed. U.S.C.A.Const.Amend. 5.

10. Criminal Law ⇐412.2(4, 5)

Defendant may waive his rights to remain silent and to presence of retained or appointed attorney during custodial interrogation provided the waiver is made voluntarily, knowingly and intelligently, but if defendant indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking, there can be no questioning. U.S.C.A. Const.Amend. 5.

11. Criminal Law ⇐412.2(5)

When accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. U.S.C.A.Const.Amend. 5.

12. Criminal Law ⇐412.2(4)

Accused, having expressed his desire to deal with police only through counsel, is not subject to further interrogation by authorities until counsel has been made available to him, unless accused initiates further communication, exchanges or conversations with the police. U.S.C.A.Const.Amend. 5.

13. Criminal Law ⇐412.2(4)

Per se rule against further police-initiated custodial interrogation after request for counsel was inapposite to situation in which state officers interviewed defendant at jail about state offenses six days after he refused to answer FBI agent's questions about unrelated federal crimes without lawyer being present, in that defendant's privilege against self-incrimination was protected by "other effective means" when federal magistrate had informed defendant of his rights and offered to appoint counsel for him, he signaled willingness to discuss crimes with law enforcement authorities, state officers asked defendant if he wanted attorney present and defendant waived that right. LSA–Const.Art. 1, § 13; U.S.C.A.Const. Amends. 5, 6.

14. Criminal Law ⇐412.2(4)

Miranda is not to be read to impose absolute ban on resumption of questioning at anytime or place on any subject after defendant has made request for counsel. LSA–Const.Art. 1, § 13; U.S.C.A.Const. Amends. 5, 6.

15. Criminal Law ⇐531(3)

Evidence, at hearing on motion to suppress defendant's murder confession, indicated that his will had not been overborne and that confession had been made freely and voluntarily. LSA–C.Cr.P. art. 703, subd. D; LSA–R.S. 15:451.

16. Criminal Law ⇐535(1)

Accused cannot be convicted on his own uncorroborated confession without proof of the corpus delicti.

17. Criminal Law ⇐535(2)

Corpus delicti must be proven by evidence which jury may reasonably accept as establishing that fact beyond reasonable doubt.

18. Homicide ⇐228(1), 236(1)

Before there can be conviction for murder, death of the person alleged to have been killed, together with criminal agency of someone as the cause of the death, must be established beyond reasonable doubt.

19. Criminal Law ⇐535(2)

In prosecution for first-degree murder, evidence, including evidence that medallion around neck of partly decomposed body and other items found near the body were the belongings of certain person, that teeth within the body were such person's teeth and that there was slash-like opening in neck and a vaginal laceration, sufficiently established corpus delicti so as to permit defendant's confession to be admitted into evidence.

20. Constitutional Law ⇐268(5)

Defendant's right to be protected against prosecution's failure to disclose exculpatory evidence is founded on due process clause and is designed to assure a fair trial and not to deter prosecutorial misconduct. U.S.C.A.Const.Amend. 14.

21. Criminal Law ⇐1171.8(1)

Conviction obtained by knowing use of perjury must be aside if there is any reasonable likelihood that false testimony could have affected judgment of jury.

22. Criminal Law ⇐627.8(6)

Standard for materiality, in cases in which specific evidence has been suppressed despite a pretrial request for such evidence, is whether the suppressed evidence might have affected the outcome of trial.

23. Criminal Law ⇐1166(1), 1171.1(1)

In cases in which there has been a general request for disclosure of evidence or no request at all, a conviction will be overturned, on the basis of failure to disclose evidence, if the omitted evidence creates a reasonable doubt which did not otherwise exist.

24. Criminal Law ⇐1181

In proceeding in which defendant was convicted of first-degree murder and was sentenced to death, case would be remanded for determination whether note, which was found at scene of crime, which contained the words "you will never catch us" or "you never find her" and which State failed to disclose in response to a general request for disclosure, would, if used as evidence or otherwise at trial, or whether further evidence gained from note's inspection and analysis, would, on its evaluation in context of the entire record, create a reasonable doubt as to defendant's guilt.

25. Criminal Law ⇐1213

In prosecution for first-degree murder, denial of defendant's motion to quash indictment based on contention that first-degree murder statute provided for cruel and unusual punishment was not error. LSA-R.S. 14:30; U.S.C.A.Const.Amend. 8.

26. Witnesses ⇐337(5)

In prosecution for first-degree murder, refusal to grant motion to restrain district attorney from using prior convictions on cross-examination was not error, though it was argued that defendant would be inhibited from testifying unless the motion were granted. LSA-R.S. 15:495.

27. Criminal Law ⇐829(1)

In prosecution for first-degree murder, refusal to give two requested jury charges was not error, in view of fact that substance of such charges were included in the general charge. LSA-C.Cr.P. art. 807.

28. Criminal Law ⇐1171.1(6)

In first-degree murder prosecution in which defendant was sentenced to death, argument, in which prosecuting attorney asked jury, during penalty phase, to assume that defendant would be pardoned or have his sentence commuted in considering whether he should live or die, in which attorney inaccurately stated that a future governor considering defendant's application for pardon or commutation would more than likely not know the facts of the case and that a life sentence never exacted lifetime imprisonment and which jury was not instructed to disregard, was error requiring that sentence be set aside and a new penalty hearing be held. LSA-C.Cr.P. arts. 774, 905.2-905.5.

29. Criminal Law ⇐1206(1)

Constitutionality of a death penalty scheme depends on whether jury's discretion is channeled and guided by clear, objective and specific standards.

30. Criminal Law ⇐1206(1)

Capital punishment procedure, which leaves to jury's unbridled discretion the selection of those defendants to receive death sentence, will be struck down as unconstitutional.

31. Criminal Law ⇐1208(1)

Having found a statutory aggravating circumstance, jury is required to consider evidence of any mitigating circumstances, and to weigh it against the statutory aggravating circumstances so found, before recommending either a penalty of life imprisonment without parole or a sentence of death. LSA-C.Cr.P. arts. 905.2, 905.3.

32. Criminal Law ⇐1144.17

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William J. Guste,
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Farmer, Dist. Atty.,
Jr., Abbott J. Reeve
plaintiff-appellee.

S. Austin McEl
fendant-appellant.

DENNIS, Justice

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trial court, Supreme Court must presume that death sentence was imposed under influence of an arbitrary factor unless the record clearly indicates that jury was properly informed of its duty and admonished to disregard the improper remarks, and the record indicates that jury heeded the admonition. LSA–C.Cr.P. arts. 774, 905.2–905.5.

33. Criminal Law ⇐1171.1(6)

Prosecutor's argument conveying message that jurors' responsibility, in regard to determining whether death sentence should be imposed, is lessened by fact that their decision is not the final one, or which contains inaccurate or misleading information, deprives defendant of a fair trial and requires that death penalty be vacated. LSA–C.Cr.P. arts. 774, 905.2–905.5.

34. Criminal Law ⇐713

In first-degree murder prosecution in which defendant was sentenced to death, prosecuting attorney's argument, during penalty phase, that responsibility for death sentence started with jurors and was passed on to a series of courts and that "everything" would more than likely be reviewed by "every appeals court in the state," state supreme court, federal district court, federal appellate courts and United States Supreme Court was misleading and improper. LSA–C.Cr.P. arts. 774, 905.2–905.5.

William J. Guste, Jr., Atty. Gen., Barbara Rutledge, Asst. Atty. Gen., Marion B. Farmer, Dist. Atty., Herbert R. Alexander, Jr., Abbott J. Reeves, Asst. Dist. Attys., for plaintiff-appellee.

S. Austin McElroy, Covington, for defendant-appellant.

DENNIS, Justice.

The defendant, Robert Lee Willie, was convicted of first degree murder and sentenced to death. He appeals from his conviction and sentence, urging fifteen assignments of error.

On May 28, 1980, at approximately 4:30 a.m., Robert Lee Willie and Joseph Vaccaro offered a ride to the victim, Faith Hathaway, outside of the Lakefront Theatre, a disco in Mandeville, Louisiana. Miss Hathaway, an 18 year old woman, had been celebrating her last night as a civilian before entering the United States Army. Instead of taking the victim to her home in St. Tammany Parish, as she had requested, Willie and Vaccaro took Hathaway to Fricke's Cave, a heavily wooded, secluded gorge south of Franklinton in Washington Parish. Willie or Vaccaro, or both, raped the young woman there. Afterwards, one of the men repeatedly stabbed the victim in the throat while the other held her hands. Hathaway's clothes and purse were found approximately one hundred fifty yards from her body on June 1st, 1980. Her body was discovered on June 4, 1980.

On June 3, 1980, Willie and Vaccaro were arrested in Hope, Arkansas for unrelated crimes of aggravated rape, aggravated kidnapping and attempted murder committed against persons other than Hathaway. On June 10, 1980, both defendants admitted to police officers that they seized Hathaway but each accused the other of raping her and slashing her throat.

A. TRIAL OF GUILT OR INNOCENCE

ASSIGNMENTS OF ERROR NOS. 1 and 2

[1–3] The defendant contends that the trial court erred in failing to order a venue change pursuant to La.C.Cr.P. arts. 621 et seq. In rejecting the motion for a change of venue, the trial court apparently found that the defendant failed to carry his burden of proving "that by reason of prejudice existing in the public mind or because of undue influence, or that for any other reason, a fair and impartial trial cannot be obtained in the parish where the prosecution is pending." La.C.Cr.P. art. 622; *State v. Bell*, 315 So.2d 307 (La.1975).[1] Although

1. A number of factors must be considered in determining whether to change venue. As this court noted in *State v. Bell*,

> Some relevant factors in determining whether to change venue are (1) the nature of pretrial publicity and the particular degree to

the trial court possesses a broad range of discretion in this area, see, e.g., *State v. Adams*, 394 So.2d 1204 (La.1981); *State v. Felde*, 382 So.2d 1384 (La.1980); *State v. Sonnier*, 379 So.2d 1336 (La.1980), we are required to make an independent evaluation of the facts to determine whether the accused received a fair trial, unfettered by outside influences. *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). In our review, however, we have the benefit of a completed trial record. The record demonstrates that counsel for the defendant conducted a thorough voir dire of the prospective jurors. Of the fifty-two prospective jurors, forty-seven had read or heard about the case. However, only ten of the fifty-two said they had formed any opinion as to the defendant's guilt or innocence. Four of those testified that they could set aside that opinion and render a verdict based on the evidence presented at trial. The court sustained challenges for cause as to those six who had formed an opinion but who were unable to lay their preconceived opinion aside. In addition, the defendant exercised his privilege of challenging twelve other prospective jurors peremptorily. We believe that the qualifications possessed by each selected juror met or exceeded the minimum requirement that "the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin v. Dowd*, 366 U.S. 717, 723, 81 S.Ct. 1639, 1643, 6 L.Ed.2d 751 (1961). In the instant case, the jury selection procedure resulted in the seating of a jury consisting of five women and seven men. In addition, the jury verdict in Joseph Vaccaro's case, which was tried simultaneously and in the same parish, reflects some degree of discernment in assessing the evidence, since the jury recommended a penalty of life imprisonment without parole for Vaccaro, whose complicity in the crimes was equal to that of Willie insofar as it was reflected by the pretrial news coverage. The record shows that the great bulk of publicity consisted of straight news reporting, which occurred nearly two months before the trial. The extent to which governmental officials were responsible for the publication of objectionable matter about the case was minimal. The district attorney was quoted as stating that he would personally conduct the prosecution to make sure that "these two animals" would not walk the streets again. This prejudicial remark was very brief, however, and had probably lost whatever force it had by the time of trial. Although the crime was vile and outrageous, and was thoroughly covered by the area news media, it was not attended by other inflammatory factors such as racial strife, see *State v. Bell*, 346 So.2d 1090 (La.1977), murder of law enforcement officials, *State v. Felde*, 382 So.2d 1384 (La.1980) or an egregious event such as a televised confession. See *Rideau v. La.*, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963). On the contrary, the defendant and the victim were of the same race, and neither was a resident of the parish in which the crime occurred and the trial was held. From our independent review of the facts, we are convinced of the correctness of the trial court's ruling on this issue.

which it has circulated in the community, (2) the connection of government officials with the release of the publicity, (3) the length of time between the dissemination of the publicity and the trial, (4) the severity and notoriety of the offense, (5) the area from which the jury is to be drawn, (6) other events occurring in the community which either affect or reflect the attitude of the community or individual jurors toward the defendant, and (7) any factors likely to affect the candor and veracity of the prospective jurors on voir dire. See, generally, Annotation, 33 A.L.R.3d 17 (1970).

ASSIGNMENT OF ERROR NO. 3

[4, 5] By this assignment defendant contends the trial court erred in denying his

Other factors we have indicated are relevant to this inquiry include:

"• • • The degree to which the publicity has circulated in areas to which venue could be changed, the care exercised and the ease encountered in the selection of the jury, the familiarity with the publicity complained of and its resultant effect, if any, upon the prospective jurors or the trial jurors, and the peremptory challenges for cause exercised by the defendant in the selection of a jury. *See, generally*, Annotation 33 A.L.R.3d 17 (1970)" *State v. Bell*, 346 So.2d 1090 (La.1977); *State v. Berry*, 329 So.2d 728 (La.1976).

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motion for sequestration of jurors during voir dire, although he permitted individual questioning of the prospective jurors. The manner in which the veniremen are called and the scope of the examination are left to the court's discretion. La.C.Cr.P. art. 784; Id. comment (c); art. 786. The burden is therefore on the defendant to show that the court misused its discretion in refusing to sequester the venire during voir dire. *State v. Monroe*, 397 So.2d 1258 (La.1981); *State v. Berry*, 391 So.2d 406 (La.1980); *State v. Dominick*, 354 So.2d 1316 (La.1978). Because the defendant has failed to show any misuse of discretion, this assignment is without merit.

ASSIGNMENT OF ERROR NO. 4

[6] By this assignment defendant argues that the trial court erred in denying his motion for continuance filed four days before trial. Defense counsel was alloted one hundred nine days from his appointment and at least thirty-nine days from the fixing of the case for trial for preparation. He complains he received some amended discovery responses from the district attorney only four days before trial and that he was notified only one month before trial that the state would definitely try the murder case on that date as opposed to unrelated rape charges. Defendant has failed, however, to show how these inconveniences prevented adequate preparation for trial. Since it is within the trial court's discretion to grant a continuance and to judge if there is good ground therefore, La.C.Cr.P. art. 712, this assignment is without merit.

ASSIGNMENT OF ERROR NO. 5

[7] By this assignment defendant charges that the trial court erred in denying his motion to have him transferred to the Washington Parish or St. Tammany Parish jail four days before trial and during trial to facilitate the assistance of counsel in his defense. During the brief hearing on the motion, at which only arguments were presented, the trial judge was presented with these contentions: Defendant was incarcerated in a federal facility in New Orleans where he would be available to defense counsel on weekends and after hours. The Washington Parish jail was already filled to its maximum capacity. During trial the defendant was to be brought to Washington Parish for court each day and returned each night to New Orleans under guard by federal marshals. The travel time one way from defendant's place of incarceration to the courthouse was approximately two hours. The trial judge resolved the problem by assuring defense counsel that, in addition to having defendant made available to him in New Orleans, the court would arrange for further conferences if necessary before the defendant was returned to the federal penal facility on days during the trial. This is the type of question which appropriately lies within the trial court's discretion because of the impracticability of framing a rule of decision where many disparate factors must be weighed. See *State v. Talbot*, 408 So.2d 861 (La.1980) (on rehearing); *Noonan v. Cunard Steamship Co.*, 375 F.2d 69, 71 (2d Cir. 1967). The trial judge's solution to this particular problem appears to be reasonable, workable, and a proper exercise of his discretion. Defendant did not object during trial or present evidence that the procedure outlined by the trial court prevented adequate consultation with counsel. Accordingly, this assignment is without merit.

ASSIGNMENTS OF ERROR NOS. 6 and 7

[8] Defendant asserts that the trial court erred in making certain statements of law during the voir dire. Defendant further asserts that the trial court erred in not granting a mistrial as to these statements upon a defense motion to do so.

The trial judge made the following statements:

> Now if the state does prove in presenting their case guilt in your mind beyond a reasonable doubt, then you would legitimately expect something else, but it all depends on the state's proof, not on what the defense puts up .... what you weigh is the state's evidence. The state has the

burden. They present their case first, and if from the evidence which they have presented, they have failed to prove something that is necessary in order to obtain guilt, then at that time the defense has the right not to put on anything, just to rest on the inadequacy of the state's case....

What you're doing is weighing the state's case. You don't weigh the defendant's case until after you weigh the state's case. They have the burden to carry out proof. If they fail to do it, then he doesn't have to do anything, because of this rule of presumption of innocence, you see. Now, if they do it, you might expect something else. The first thing [defense counsel objects]..... The state has to prove its case beyond a reasonable doubt, and if you feel like they have not done that after they present their case, then he would be entitled to a verdict of not guilty; in other words, you weigh the evidence presented by the state before you expect anything. Can you do that?

You would not necessarily expect him to do anything, you would weigh the evidence of the case of the state as to what they presented.

La.C.Cr.P. art. 770, which codifies the jurisprudential rules with reference to prejudicial remarks that could form the basis of a mistrial, provides in pertinent part as follows:

Upon motion of a defendant, a mistrial shall be ordered when a remark or comment, made within the hearing of the jury by the judge, district attorney, or a court official, during the trial or in argument, refers directly or indirectly to:

* * * * * *

(3) The failure of the defendant to testify in his own defense;

* * * * * *

An admonition to the jury to disregard the remark or comment shall not be sufficient to prevent a mistrial. If the defendant, however, requests that only an admonition be given, the court shall admonish the jury to disregard the remark or comment but shall not declare a mistrial.

The judge's remarks did not refer directly or indirectly to the failure of the defendant to testify in his own defense. It came dangerously close. But our careful scrutiny convinces us that the comment was intended to inform the jury that the state must prove the defendant's guilt beyond a reasonable doubt, regardless of whether the defendant presents any evidence, and that the average juror would not have inferred from it a reference to defendant's failure to testify. This assignment of error lacks merit.

ASSIGNMENT OF ERROR NO. 8

Defendant argues that the trial court erred in not granting the motion to suppress his confession. It is defendant's contention that the statement he gave to authorities was given involuntarily and in violation of his *Miranda* rights.

On June 3, 1980, Special Agent Lambert of the FBI and Lieutenant Duvall of the Arkansas State Police advised the defendant of his constitutional rights in Hope, Arkansas, after his arrest there on unrelated aggravated rape, aggravated kidnapping, and attempted murder charges. The defendant was not interviewed on that date because he refused to answer questions without a lawyer being present. On June 4, 1980, Willie was taken to Texarkana, Arkansas and again advised of his right to an attorney by a United States Magistrate, who read charges against him and set bond. The defendant waived his right to an attorney for purposes of that hearing and informed the United States Magistrate that he had an attorney in Louisiana but did not request his presence.

At the motion to suppress hearing, FBI agent Lambert testified that on June 11, 1980, he received a call from one of Willie's jailers informing him that on June 9, 1980, the defendant had requested to speak to Lambert. On June 10, 1980, Investigator Michael Varnado of the Washington Parish District Attorney's Office and Sergeant Donald Sharp of the St. Tammany Parish Sheriff's Office interviewed Willie at the

jail in Texarkana, Ar
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jail in Texarkana, Arkansas regarding the Hathaway murder and rape. Sergeant Sharp testified that, before the interview, he fully advised Willie of his constitutional rights and that the accused expressly stated that he did not want the assistance of an attorney. Willie was then informed that his co-defendant, Vaccaro, had just given an oral statement to Varnado and Sharp in connection with the Hathaway murder. Investigator Varnado informed the defendant that his mother had been arrested for harboring him but that in his opinion the charges would be dismissed if further investigation revealed they had no merit. Nevertheless, the officers testified that no promises of any kind were made to the accused. Willie gave them an oral statement and a tape recorded statement which he signed after it was transcribed. Willie did not testify at the motion to suppress hearing or present any evidence to controvert the officers' testimony.

These events raise the questions of (1) whether Willie knowingly, voluntarily and intelligently waived his right to counsel and his privilege against self-incrimination; and (2) whether his confession was free and voluntary.

[9, 10] The United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), set forth procedures to insure that an individual subject to custodial police interrogation is accorded his privilege under the Fifth Amendment not to be compelled to incriminate himself. These included the following: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.[2] Unless other fully effective measures are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be informed that he has a right to remain silent, that any statement he does make may be used in evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly, and intelligently. "If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." *Id.* 384 U.S. at 444, 86 S.Ct. at 1612. At another point in the opinion, the court declared, "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." 384 U.S. at 474, 86 S.Ct. at 1627.

Article I § 13 of the 1974 Louisiana Constitution requires that any person arrested or detained in connection with the investigation or commission of any offense must be advised fully of the reasons for his arrest or detention, his right to remain silent, his right against self-incrimination, his right to the assistance of counsel and, if indigent, his right to court appointed counsel. By the adoption of this provision, Louisiana enhanced and incorporated the prophylactic rules of *Miranda v. Arizona*. *In Re Dino*, 359 So.2d 586 (La.1978).

[11, 12] In *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), the high court made clear that when an accused has invoked his right under *Miranda* to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. An accused, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further

2. By custodial interrogation the Supreme Court meant questioning initiated by law enforcement officials after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Miranda v. Arizona*, 384 U.S. at 444, 86 S.Ct. at 1612; *State v. Menne*, 380 So.2d 14 (La.1980).

communication, exchanges or conversations with the police. Ibid.

Six months before the decision in *Edwards v. Arizona*, this court, in *State v. Thucos*, 390 So.2d 1281 (La.1980), reached a similar conclusion. In that case we held that after an accused invoked his right to have counsel present during custodial interrogation, the police failed in their duty to scrupulously honor his right when they initiated further questioning shortly after his request for counsel. The accused did not have an attorney present although he had not withdrawn his request for one.

[13, 14] Although the per se rule against further interrogation after a request for counsel appears at first blush to have direct application in the present case, we conclude that it is inapposite after careful examination of the reasons underlying *Miranda*. First, in announcing the procedural safeguards, the *Miranda* court declared they were to be employed "unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it...." 384 U.S. at 444, 86 S.Ct. at 1612. The court noted that Rule 5(a) of The Federal Rules of Criminal Procedure, and its effectuation of that rule in *McNabb v. United States*, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (1943), and *Mallory v. United States*, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1957), requiring production of an arrested person before a commissioner without unnecessary delay and excluding evidence obtained in default of that statutory obligation, were responsive to the same considerations of Fifth Amendment policy that faced the court in *Miranda* as to the States. Since Willie was brought before a federal magistrate who informed him of his rights and offered to appoint counsel for him in compliance with the supervisory rules, his privilege under the Fifth Amendment was protected by "other effective means" as required by *Miranda*. Second, *Miranda* is not to be read to impose an absolute ban on resumption of questioning at anytime or place on any subject. See, *Michigan v. Mosley*, 423 U.S. 96, 115, 96 S.Ct. 321, 332, 46 L.Ed.2d 313, 328 (1975) (Brennan, J., dissenting). For example, in discussing the *Westover* case, the *Miranda* court indicated that improper interrogation by one law enforcement agency would not necessarily bar questioning about a different crime by a legally distinct authority.[3] 384 U.S. at 496, 86 S.Ct. at 1639. Also, the high court cited with approval the FBI practice of terminating interviews upon receiving a request for counsel except "as to all matters *other* than the person's own guilt or innocence." 384 U.S. at 485, 86 S.Ct. at 1633. Finally, under the unique circumstances of this case, Willie's refusal to answer the FBI agent's questions about federal crimes without an attorney should not be construed as a per se invocation of his Fifth Amendment rights as to independent state offenses requiring all interrogation as to the latter to cease. The *Miranda* court sought to formulate protective devices to dispel the compulsion inherent in custodial interrogations, which have largely taken place incommunicado. 384 U.S. at 457, 86 S.Ct. at 1618. There is no indication in the record that Willie was held incommunicado. When he asked not to be questioned without an attorney about the federal crimes by the FBI agent, his right was scrupulously honored. There was no reason for him to believe the Louisiana officials would behave differently. He was specifically asked by the state officers if he wanted an attorney present and he expressly waived this right. By the time the state officers approached Willie, one week had elapsed since the FBI agent attempted to interview him, Willie had been removed from his original surroundings, he had appeared before a federal magistrate, and he had voluntarily sign
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had voluntarily signalled his willingness to discuss his crimes with law enforcement authorities. For all of these reasons, we conclude that Willie was under no pressure to answer questions about the state crimes without the presence of an attorney, but that he did so knowingly and intelligently after being fully advised of his rights and given an opportunity to exercise them.

Moreover, even if the *Edwards v. Arizona* rule is applicable here, after Willie first refused to answer questions by the FBI agent without the presence of counsel, he himself initiated further communications with both federal and state law enforcement officials. Although the evidence indicates he initially asked to talk to the FBI agent, the record contains no suggestion that he was in any way reluctant to talk to all law enforcement officials.

The general rule is that, on the trial of a motion to suppress, the burden of proof is on the defendant to prove the grounds of his motion. La.C.Cr.P. art. 703(D). One exception to the rule is that the State has the burden of proving beyond a reasonable doubt the voluntariness of a confession which the defendant has moved to suppress as evidence at the trial on the merits. La.C.Cr.P. art. 703(D); La.R.S. 15:451; *State v. Glover*, 343 So.2d 118 (La.1977); *State v. Johnson*, 363 So.2d 684 (La.1978); *State v. Bouffanie*, 364 So.2d 971 (La.1978); *State v. Volk*, 369 So.2d 128 (La.1979); *State v. Jones*, 376 So.2d 125 (La.1979). In reviewing the trial judge's ruling as to the admissibility of a confession, his conclusions on credibility are entitled to the respect due those made by one who saw the witnesses and heard them testify. *State v. Bouffanie, supra.*

[15] In the present case, Willie did not testify at the suppression hearing or trial. Each law enforcement officer who testified stated that no promises, threats, or coercion of any kind was used on Willie. Investigator Varnado informed Willie that in his opinion, if the charges aginst Willie's mother were without merit, they would be dismissed. However, Varnado testified that he made no promises to Willie.

Willie was in jail for one week prior to his giving of the statement. It is uncontradicted, however, that no authorities questioned him during this time. Before Willie confessed, he had been advised of his rights on at least three occasions, a federal magistrate had offered to appoint an attorney for him, and he had declined stating that he had a lawyer in Louisiana. It does not appear from the evidence that Willie's will was overborne. His inculpatory statement appears to have been made freely and voluntarily. Accordingly, this assignment of error is without merit.

ASSIGNMENTS OF ERROR NOS. 9 and 10

Defendant argues that the trial court erred in finding that the State proved the corpus delicti of the crime charged to such a degree that the jury could find that the corpus delicti had been proven beyond a reasonable doubt. Based upon this alleged error, the defendant urges that the trial court also erred by admitting into evidence the defendant's confession.

[16–18] It is well settled that an accused party cannot be legally convicted on his own uncorroborated confession without proof that a crime has been committed by someone; in other words, without proof of the corpus deliciti. *State v. Ashley*, 354 So.2d 528 (La.1978); *State v. Mullins*, 353 So.2d 243 (La.1977); *State v. Freetime*, 334 So.2d 207 (La.1976); *State v. Sellers*, 292 So.2d 222 (La.1974); *State v. Brown*, 236 La. 562, 108 So.2d 233 (1959); *State v. Calloway*, 196 La. 496, 199 So. 403 (1940); *State v. Morgan*, 157 La. 962, 103 So. 278 (1925). The corpus delicti must be proven by evidence which the jury may reasonably accept as establishing that fact beyond a reasonable doubt. *State v. Carson*, 336 So.2d 844 (La.1976); *State v. Brown, supra; State v. Morgan, supra.* In a prosecution for murder, before there can be a legal conviction, the death of the person alleged to have been killed, together with the criminal agency of someone as the cause of the death, must be established beyond reasonable doubt. *State v. Gebbia*, 121 La. 1083, 47 So. 32 (1908).

[19] Although the body of the deceased was partially decomposed upon its discovery, the death of Faith Hathaway was firmly established by the evidence. The medallion found around the neck of the victim by Dr. McGarry, the pathologist who performed the autopsy, was matched to a photograph of Hathaway wearing the medallion. Other items of evidence found near the body of the victim were identified as her belongings, including her driver's license and birth registration card. The victim's uncle, Dr. Donald Trewick, a dentist, inspected the body, compared the deceased's dental restorations with Faith Hathaway's dental records. He concluded that the teeth he examined at the funeral home were Faith Hathaway's teeth.

Dr. McGarry, who performed the autopsy, testified that he felt that a large slash-like opening in the soft tissues in the front of the neck extending all the way across the neck was probably the fatal wound. He also concluded that a deep wound of the right hand was probably due to an attempt at defense against the wound in the neck. A vaginal laceration indicated to him that forceful intercourse had taken place at about the same time. The evidence further established that Hathaway's nude body was found in a remote area and that no object which could have caused the wounds was found at the scene. This evidence established beyond a reasonable doubt that Faith Hathaway's death was caused by the criminal agency of someone. Hence, the corpus deliciti was established independently of defendant's confession, and these assignments of error have no merit.

ASSIGNMENTS OF ERROR NOS. 11, 12 and 13

After both the State and the defendant rested their cases, the defendant moved for a mistrial contending that the prosecution had in its possession a note found at the scene of the crime which may have constituted exculpatory evidence which the State failed to disclose in response to a general *Brady* request. The court denied the motion. Defense counsel asked the judge, "Would you inspect it?" The trial court replied that he would inspect and consider it on a motion for a new trial. Defense counsel did not specifically request an inspection of the note or move the court to order the district attorney to produce it for inspection by the defendant or the court.

In brief in this court the state and the defendant assert that the note contains the words "you will never catch us" or "you never find her." The prosecution contends that the note was discovered three days after the body was found, that it was probably left by a prankster, and that it constitutes neither inculpatory nor exculpatory evidence.

[20] The defendant's right to be protected against the prosecution's failure to disclose exculpatory evidence is founded upon the due process clause and is designed to assure a fair trial and not to deter prosecutorial misconduct. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); 8 Moore's Federal Practice § 16.06 (2d ed. 1981). *In United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), the Supreme Court set forth three categories of cases to which *Brady* arguably applies and enunciated standards for each category.

[21] The first category is illustrated by *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935), and includes cases in which the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecutor knew, or should have known, of the perjury. A strict standard of materiality is applied in such cases and a conviction obtained by the knowing use of perjury must be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury". *United States v. Agurs*, *supra* 427 U.S. at 103, 96 S.Ct. at 2397.

[22] The second category of cases, typified by *Brady* itself is characterized by a pretrial request for specific evidence. The standard for materiality in such cases is whether the suppressed evidence "might have affected the outcome of the trial."

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[23] The third category of cases consists of those in which a general request ("all *Brady* materials") or no request at all is made. A conviction will be overturned, in such cases, if the omitted evidence creates a reasonable doubt that did not otherwise exist. The omission must therefore be evaluated in the context of the entire record.

> If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

United States v. Agurs, 427 U.S. at 112–13, 96 S.Ct. 2401.

[24] In the instant case there was no specific pretrial request for the undisclosed evidence. Even if we construe the defense counsel's motion for a mistrial as a specific request for the evidence, it did not come until after both parties had rested their cases. Accordingly, this case falls in the third category and presents the question of whether the omitted evidence creates a reasonable doubt that did not otherwise exist.

The defendant reurged this assignment of error in his motion for a new trial. The motion was denied, however, and apparently without affording defendant an opportunity to inspect and analyze the note or to make a showing that "the defense might have made effective use of the [note] at the trial or in obtaining further evidence". *Giles v. Maryland*, 386 U.S. 66 at 74, 87 S. Ct. 793 at 797, 17 L.Ed.2d 737. See, *State v. Henderson*, 362 So.2d 1358 (La.1978); 8 Moore's Fed. Practice § 16.06[3] p. 16–137.

Because defendant has never been given such an opportunity, and because the note is not part of the record in this case, we will remand the case to the trial court for it to determine, in the light of this opinion, whether the note, used as evidence or otherwise at trial, or further evidence gained from the note's inspection and analysis, would, upon its evaluation in the context of the entire record, create a reasonable doubt as to the defendant's guilt.

ASSIGNMENT OF ERROR NO. 14

By this assignment defendant argues that the trial court erred in denying his motion for a new trial. The motion is based for the most part on the 13 preceding assignments of error with which we have already dealt. Accordingly, we pretermit further discussion of them.

Additionally, the defendant moved for a new trial on the ground that the court's ruling on a written motion, or an objection made during the proceedings, shows prejudicial error, viz., (1) the court's denial of defendant's motion to quash the indictment, (2) its failure to restrain the district attorney from using prior convictions on cross examination, (3) and its refusal to give jury charges requested by defendant.

[25] The defendant's motion to quash the indictment included allegations regarding alleged irregularities in the grand jury proceedings. No evidence was provided to substantiate these allegations. The defendant also asserted that the indictment failed to charge an offense which is punishable under a valid statute in that Louisiana's first-degree murder statute, La.R.S. 14:30, provides for cruel and unusual punishment. We find no error in the trial court's denial of defendant's motion to quash. Cf. *State v. Payton*, 361 So.2d 866 (La.1978).

[26] Defendant urged, in his motion for a new trial, that the trial court erred in not granting his motion to restrain the district attorney from using prior convictions on cross examination. It was argued that Robert Willie would be inhibited from testifying in his own behalf unless the court were to restrain the district attorney from using prior convictions to impeach Willie's credibility. We find no error in the trial court's denial of this motion. La.R.S. 15:495; *Spencer v. Texas*, 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967); *State v. Prather*, 290 So.2d 840 (La.1974).

[27] The defendant argued that the trial court erred in its refusal to give requested

jury charges numbers two and three. The substance of special jury charges numbers two and three was included in the general charge and the charges were superfluous. La.C.Cr.P. art. 807.

Consequently, we find that the trial court did not err in denying defendant's motion for a new trial.

ASSIGNMENT OF ERROR NO. 15

Defendant argues that an error patent on the face of the record might require reversal of the conviction. No specific error patent is alleged. A review of the record shows no errors patent. Accordingly, this assignment lacks merit.

B. THE PENALTY TRIAL

[28] In the penalty phase of the case, the prosecuting attorney presented two arguments to the jury which created a reasonable possibility that the death sentence was imposed under the influence of passion, prejudice or arbitrary factors. Essentially these arguments urged the jury to impose the death penalty to prevent the defendant from receiving a pardon or commutation and encouraged the jury to view its selection of the penalty as a tentative one subject to change by numerous reviewing courts.

1. Argument as to Governor's powers of pardon and commutation:

The prosecuting attorney presented the following argument to the jury:

> "* * * Mr. McElroy said that the rest of his life behind bars with no parole, no probation, no suspension of sentence would be enough for Mr. Willie in this case, but once again let's look at things in a hard, cold light of reality and tell you the truth. He's right. The statute does say no probation, no parole, no suspension of sentence, but have you ever heard of pardon, commutation? Those are two things that are given to the governor of the State of Louisiana in the Constitution of the State of Louisiana and it can't be taken away by statute. As a result, the governor, whoever is the governor, eight, ten, twelve years from now, twenty years from now, can take it upon himself to let Robert Lee Willie back out onto the streets and back out into society, because that governor more than likely will not know the facts of this case. So don't think that life really ever means life, because it doesn't. * * *"

By this argument, the jury was informed that a sentence of life without benefit of parole would not protect society from a dangerous criminal because (1) the Governor may commute sentences and pardon those convicted; (2) a future governor considering clemency in a particular case likely will not know the facts of the case; and (3) in practice, a life sentence is never carried out. The prosecuting attorney's argument that the death penalty should be imposed to avoid the defendant's almost certain release through an ill considered pardon or commutation was highly prejudicial. It called on the jury to base its decision on a consideration outside the scope of its authority and referred to facts upon which no evidence had been introduced.

The trial court did not instruct the jury to disregard the argument or the inaccurate and misleading information it contained.

[29, 30] The constitutionality of any death penalty scheme depends on whether the jury's discretion is channeled and guided by clear, objective and specific standards. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). A capital punishment procedure which leaves to the jury's unbridled discretion the selection of those defendants who shall receive the death sentence will be struck down. *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972); *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976). Accordingly, the statutes under which defendant's death sentence was imposed were based on those approved by the United States Supreme Court as providing adequate standards to guide the jury in selecting those among first degree murderers who should receive the death penalty.

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[31] The legislative aim of our death penalty scheme is clear. The sentencing hearing must focus on the circumstances of the offense and the character and propensities of the offender. La.C.Cr.P. art. 905.2. The sentence will be life imprisonment without parole, probation, or suspension of sentence unless the jury finds unanimously and beyond a reasonable doubt at least one statutorily defined "aggravating circumstance." La.C.Cr.P. art. 905.3. Having found a statutory aggravating circumstance, the jury is required to consider evidence of any mitigating circumstances, and to weigh it against the statutory aggravating circumstance(s) so found, before recommending the more appropriate penalty, either a penalty of life imprisonment without parole or a sentence of death. *State v. Sonnier*, 402 So.2d 650, 657 (La.1981).

An argument based on the law governing pardon and commutation or its administration by the governor and other executive officers is entirely inappropriate to a capital sentencing proceeding. Only evidence relevant to a statutorily prescribed aggravating circumstance, a mitigating circumstance, or the character and propensities of the offender is properly admissible at such a hearing. La.C.Cr.P. arts. 905.2, 905.4, 905.5. The capital sentencing hearing must be conducted according to the rules of evidence and, insofar as applicable, the code of criminal procedure. La.C.Cr.P. art. 905.2. Consequently, the argument at a sentencing hearing may not appeal to prejudice and must be confined to evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, and to the law applicable to the case. La.C.Cr.P. art. 774. Since the law of pardon and commutation was not applicable to the case and evidence pertaining to the governor's exercise of these powers was inadmissable, the prosecuting attorney's argument erroneously and prejudicially exceeded its proper scope.

There is more at issue in this case, however, than whether prosecuting attorneys and trial courts must follow statutory rules of evidence and procedure. The injection of pardon and commutation questions into a sentence proceeding tends to skew the legislature's constitutionally sound death penalty scheme. Jurors are thereby encouraged to consider the vicissitudes of executive clemency instead of the clear, objective, and specific standards enacted for the purpose of channeling their discretion. Although the jury has no constitutional oversight of executive policy, it is impelled, although ill equipped, to predict and pass judgment on future pardon and commutation practices. The substitution of this conundrum for the clear, objective statutory standards encourages the jury to exercise unbridled discretion reminiscent of the latitude found constitutionally objectionable by the United States Supreme Court in our former statute. *Roberts v. Louisiana*, *supra*.

[32] For these reasons and others, this court has held that conditions under which a person sentenced to life imprisonment without benefit of parole can be released at some time in the future are not a proper consideration for a capital sentencing jury and shall not be discussed in the jury's presence. Further, in reviewing a capital case in which an offender's potential for future release has been injected into the proceedings by the state or the trial court, this court must presume that a death sentence was imposed under the influence of an arbitrary factor unless the record clearly indicates that the jury was properly informed of its duty and admonished to disregard the improper remarks, and the record indicates that the jury heeded the admonition. *State v. Lindsey* 404 So.2d 466 (La. 1981). See also, *State ex rel., Williams v. Blackburn*, 396 So.2d 1249 (La.1981); *State v. Monroe*, 397 So.2d 1258 (La.1981); *State v. Sonnier*, 379 So.2d 1336, 1364 (La.1979) (Dennis, J., concurring in part and dissenting in part); *State v. Sonnier*, *supra* at 1368 (on rehearing).

In a thorough consideration of this problem in *State v. Lindsey*, supra, this court

noted the legal and practical considerations which weigh against the discussion of pardon or commutation in the jury's presence: to accurately inform jurors of probabilities of release and applicable time frames would create a whole new phase of sentencing and divert the jurors from their primary responsibility. The Code of Criminal Procedure does not provide for jury consideration of an offender's future potential for release. Speculation as to the actual length of a life sentence is not even remotely related to the statutorily prescribed sentencing standards, viz., the circumstances of the offense, and the character and propensities of the offender. The interjection of pardon and commutation issues provokes questions that no human mind can answer and in substance transposes the task of the governor to the jury. In this latter respect it induces the jury to pass judgment upon the very issue entrusted only to the governor and could prevent him from deciding the issue at the proper time.

Applying these precepts to the present case, it is clear that the sentence must be set aside and that a new penalty hearing must be held. The prosecuting attorney explicitly asked the jury to assume that Willie would be pardoned or have his sentence commuted in considering whether he should live or die. Furthermore, he compounded his prejudicial remarks by inaccurately stating that a future governor considering Willie's application for pardon or commutation would more than likely not know the facts of the case and by his misleading assertion that a life sentence never exacts lifetime imprisonment. The trial court gave no admonition or instruction which would dispell any of the effects of this improper, erroneous and misleading argument.

2. Presentation of Argument as to Appellate Review of Death Sentences

The prosecution further argued:

> The other thing is a lot of times people would like to think let jurors think the buck stops with you. The buck stops with you. After this, there ain't no review. You all come back with the death sentence, he's going to the chair. Ladies and gentlemen of the jury, every word that has been said during the course of this trial, every piece of evidence that has been entered into the record during the course of this trial, all the motions that were filed and heard prior to this trial, and everything will more than likely be reviewed by every appeals court in this state, including the Supreme Court of this state. It has to go to them, as a matter of fact, by law, and once that's over, then the federal appeal begins, both in the district courts, the federal district courts, the federal appellate courts, and the Supreme Court of the United States of America, before anybody is put in the chair. So the buck really don't stop with you. The buck starts with you, because without the death penalty, then they won't have all those reviews to determine whether his trial was conducted properly, he got a fair trial, he got a fair hearing, and a jury of twelve people after hearing the evidence and the testimony decided that his man, this man, had forfeited his right to live in society with the rest of us, and he has done exactly that. Forfeited his right, because of what he and Joe Vaccaro did. So what I'm asking you to do is start the buck rolling. Let's find out whether we conducted this trial properly, and let's come back with a sentence that Robert Lee Willie deserves, and that's death in the electric chair. Thank you.

[33] A prosecutor's argument conveying the message that the jurors' awesome responsibility is lessened by the fact that their decision is not the final one, or which contains inaccurate or misleading information, deprives the defendant of a fair trial in the sentencing phase and requires that the death penalty be vacated. *State v. Monroe*, 397 So.2d 1258 (La.1981); *State v. Berry*, 391 So.2d 406 (La.1980); *Id.* at 419 (Calogero, J. dissenting to denial of rehearing).

[34] In the present case, the prosecuting attorney told the jurors that: (1) the "buck," i.e., the responsibility for the death sentence, doesn't st
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sentence, doesn't stop with them: it starts with them and is passed on to a series of courts; (2) "everything" will more than likely be reviewed by "every appeals court in the state," the state supreme court, the federal district court, the federal appellate courts, and the United States Supreme Court.

This type of argument may not be made in a criminal case in which the punishment may be capital. Jurors should approach the task of finding facts and exercising discretion as to choice of penalty with appreciation that their duties are serious and that they are accountable for their decisions, not with the feeling that they are making mere tentative determinations which the courts can correct. An argument improperly diminishes the jury's duty and responsibility if it implies that a reviewing court can substitute its judgment as to choice of punishment or that the decision of whether the sentence of death is appropriate is not entirely the jury's responsibility.

In addition to implying that the jury's decision is a tentative one, the prosecuting attorney's remarks were misleading as to the number of courts which would review the case and as to the nature of each judicial review. Contrary to the impression conveyed, no court will reweigh the evidence and make a de novo determination of whether death is the appropriate penalty. Further, only this court can review the case on direct appeal; certainly not "every appeals court in the state", since their jurisdiction is presently limited to civil and juvenile matters. Finally, any review by a federal court, including the United States Supreme Court, is solely within its discretion and, if it occurs, is apt to center on legal questions far removed from the question of the appropriate penalty which the jury is called upon to decide.

In view of the foregoing, this court would be called upon to vacate the sentence and order a new penalty hearing even in the absence of the other improper, misleading and inaccurate argument discussed initially.

DECREE

Accordingly, the Defendant's conviction is affirmed but his sentence is vacated. The case is remanded to the trial court for it to determine whether the undisclosed note, or evidence which could be obtained therefrom, would, upon its evaluation in the context of the entire record, create a reasonable doubt as to the defendant's guilt. Should the trial court find that such a reasonable doubt exists after its evidentiary hearing, a new trial will be required. If the trial court finds, after an evaluation as described, that there is no reasonable doubt as to the defendant's guilt, the conviction will be affirmed[4] and a new jury shall be impanelled to determine only the issue of penalty in accordance with the procedure set out in La.C.Cr.P. art. 905.1(B).

CONVICTION CONDITIONALLY AFFIRMED; SENTENCE VACATED; REMANDED.

MARCUS, J., concurs in part and dissents in part and assigns reasons.

WATSON, J., concurs in the conditional affirmance of defendant's conviction but dissents from the reversal of sentence.

LEMMON, J., concurs and will assign reasons.

MARCUS, Justice (concurring in part and dissenting in part).

I concur in the affirmance of defendant's conviction subject to the remand but dissent from the reversal of his sentence because of certain comments made by the prosecutor during rebuttal argument. In the first place, defendant failed to object to the statements at the time of the occurrences. Moreover, even in the event of improper argument, a verdict should not be set aside unless it is clear that the jury was influenced by the remarks and that they contributed to the verdict. *State v. Simms*, 381

4. The proceedings and determinations of the trial court will be subject to review by this court on appeal.

So.2d 472 (La.1960); *State v. Lockett*, 332 So.2d 443 (La.1976). I do not consider that such was the case here.

LEMMON, Justice, concurring.

I agree that the conviction should be affirmed, but that the death penalty must be set aside because of the prosecutor's speculative comments on the possible effects of a gubernatorial pardon if the jury recommended a sentence of life imprisonment.[1]

I do not subscribe, however, to the majority's characterization of the prosecutor's comments on appellate review of the death sentence in this case as "implying that the jury's decision is a tentative one", nor do I subscribe to any suggestion that such comments necessarily tend to lessen the jury's awesome responsibility.

As this court pointed out in *State v. Berry*, 391 So.2d 406 (La.1980), comments on appellate review of the death sentence should be approached very cautiously, because they may convey a faulty impression of the jury's critical role in the assessment of penalty in capital cases. However, this court has not adopted (and should not adopt) a "per se rule" that any reference to appellate review of the jury's recommended sentence defeats the defendant's right to a fair penalty trial.

Speaking generally, I see nothing wrong with a prosecutor's accurate description of the safeguards provided by law against an arbitrary imposition of the death penalty and of the jury's role in the overall scheme of determining and imposing capital punishment. The issue in each case must therefore be whether a prosecutorial comment on appellate review of the death penalty is inaccurate, misleading or otherwise unfairly prejudicial[2].

Apparently, the comments on appellate review in this case were not made in such a way as to be manifestly prejudicial to the defendant, since the defense attorney did not object during the argument.[3] While I would not hesitate to reverse a death sentence when unfairly prejudicial comments are made without objection, I view the lack of objection as an indication of the context and "courtroom atmosphere" within which the comments were made.[4] I further note that the trial occurred prior to this court's decision on rehearing in *State v. Berry*,

1. For an earlier discussion by this court of improper prosecutorial reference to the possibility of gubernatorial pardons in capital cases, see *State v. Johnson*, 151 La. 625, 92 So. 139 (1922); *State v. Lindsey*, 406 So.2d 466 (La. 1981)

2. In *State v. Berry*, above, this court, while warning prosecutors of the dangers of such comments, said:

"[V]irtually every person of age eligible for jury service knows that death penalties are reviewed on appeal. There is no absolute prohibition against references to this fact of common knowledge, and this court should not impose an absolute prohibition, since such a reference does not necessarily serve to induce a juror to disregard his responsibility. The issue should be determined in each individual case by viewing such a reference to appellate review in the context in which the remark was made." 391 So.2d at 481.

3. The prosecutor in this case was not precisely accurate in his references to review by "every state appeals court" or to appeals (rather than discretionary review) in the federal system. Nevertheless, I do not believe that the comments on judicial review served to induce a juror to disregard his responsibility or to lessen the juror's appreciation of the significance of his role in the overall scheme of capital punishment.

4. The "contemporaneous objection rule" is no bar to this court's review of capital sentencing hearings to determine whether fundamental unfairness so infected the proceedings as to require remand for a new penalty hearing. See *State v. Sonnier*, 379 So.2d 1336 (La.1980). However, not all "improperly admitted if objected to" matters require reversal under this court's approach in *Sonnier*. Only such occurrences (whether in the form of remarks by the prosecutor, comments by the judge, testimony by witnesses or procedural irregularities) which are so flagrantly prejudicial as to undermine the fundamental fairness of the jury's recommendation fall within this judicially recognized category of "plain error". See Fed.R. Crim.P. 51 and 52. Thus, although not dispositive of the question of this court's authority to review the alleged error, the failure of counsel to object will (at least for this member of this court) be a very significant indication of either trial strategy or of counsel's determination that the occurrence was not unduly prejudicial when taken in context.

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PER CURIAM.

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above, which first questioned the prosecutor's comments on appellate review of a death sentence.

STATE of Louisiana

v.

Joseph Earl MAYFIELD.

No. 81-KA-1722.

Supreme Court of Louisiana.

Feb. 5, 1982.

Appeal from the 27th Judicial District Court, Parish of St. Landry; Isom J. Guillory, Jr., Judge.

William J. Guste, Jr., Atty. Gen., Barbara Rutledge, Asst. Atty. Gen., Morgan J. Goudeau, Jr., Dist. Atty., Robert Brinkman, Asst. Dist. Atty., for plaintiff-appellee.

Sherman Stanford, Opelousas, for defendant-appellant.

PER CURIAM.

On March 19, 1981, defendant Joseph Earl Mayfield was charged by bill of information with two counts of forgery, in violation of La.R.S. 14:72. A six-member jury subsequently convicted the accused on both counts and the trial judge sentenced him to serve consecutive terms of five years' imprisonment on each count. Defendant now appeals his conviction and sentence to this Court, relying on the two assignments of error filed below.

We have reviewed defendant's assignment concerning alleged trial error and have found it to lack substance. Defendant's remaining assignment challenges the trial court's imposition of consecutive terms as excessive, La.Const. 1974, Art. 1, § 20, and inadequately supported by the trial court's statement of sentencing reasons. La.C.Cr.P. Art. 894.1; *State v. Ortego*, 382 So.2d 921 (La.1980). Finding merit in the latter contention, we vacate the sentence imposed and remand for resentencing.

CONVICTION AFFIRMED: SENTENCE VACATED AND CASE REMANDED.

STATE of Louisiana

v.

Lionel BUCHANAN.

No. 82-K-0266.

Supreme Court of Louisiana.

Feb. 19, 1982.

Re: Lionel Buchanan, applying for writ of Certiorari, Prohibition and Mandamus, Parish of Orleans, Number 286-398 "B".

Denied.

DIXON, Chief Justice concurs in the denial, assuming that the trial judge did not "refuse to accept the Motions to Suppress", and that they were actually filed. C.Cr.P. provides that an evidentiary hearing on a motion to suppress shall be held only when the defendant alleges facts that could require the granting of relief.

DENNIS, Justice dissents from the order denying the application. The application is ambiguous. However, if the district court refused to allow the filing of the motion it was in error. There is no requirement that the motion be particularized in order to file. La.C.Cr.P. Art. 708 (A)-(D). If the district court dismissed the motion simply because it was not particularized, this was error also. An evidentiary hearing shall be held only when the defendant alleges facts that require granting of relief Art. 703(E). Thus, the trial court would have been justified in refusing to conduct a hearing but not in dismissing the motion.

the men decided not to participate in the appeal. The commissioner found that respondent did not file the appeal or any other pleadings on behalf of the remaining clients, nor did he respond to their attempts to communicate with him after April of 1977 or refund any of the fee.

The commissioner concluded that respondent had violated DR 7-101(A)(2) by failing to carry out a contract of employment and DR 1-102(A)(1), (4), (6) by engaging in conduct involving misrepresentation.

Respondent testified that he had quoted the clients a fee of $6,000 and had only been paid about $3,000. He asserted that he earned the partial fee by reviewing the voluminous file while awaiting payment of the balance of the fee, and he further testified that he notified the clients that their appeal lacked merit, offering to meet with them and explain further. He admitted, however, that he never directed a letter to the clients advising that he was not proceeding with the appeal.

After reviewing the record, we conclude the respondent collected a fee in excess of $3,000, but did not file the appeal or give appropriate notice to his clients that he was not going to pursue the matter, thereby causing them to lose their appeal rights. We further conclude that respondent failed to communicate and discuss the matter with his clients or to return the fee.

[1] In overall mitigation, respondent argues that all four complaints were lodged within a short period of time and were the first against him since he began the practice of law in 1971. He further points out that he gave up his private practice in 1979. Finally, he argues that his professional conduct did not fall below the minimum standard required by the disciplinary rules and that suspension is unwarranted by the facts.

[2] The purpose of attorney disciplinary proceedings is not primarily to punish the lawyer, but rather to maintain appropriate standards of professional conduct in order to safeguard the public, preserve the integrity of the legal profession, and to deter other lawyers from engaging in violations of the Code of Professional Responsibility. *Louisiana State Bar Ass'n. v. Causey*, 398 So.2d 88 (La.1980). We agree with the commissioner's findings that respondent violated DR 6-101(A)(3) by neglecting legal matters entrusted to him, DR 7-101(A)(2) by failing to carry out contracts of employment, and DR 1-102(A)(4) by engaging in misconduct involving misrepresentation. Failing to perform legal services for which an attorney has been paid, allowing a client to lose his right of appeal because of inaction, and misrepresenting the status of litigation by blaming the judicial system for delays are serious violations which warrant suspension from practice.

Accordingly, it is ordered that Hilliard J. Fazande, II be suspended from the practice of law in the State of Louisiana for a period of thirty months, effective upon the date of the finality of this decree. All costs of this proceeding shall be paid by the respondent.

STATE of Louisiana

v.

Robert Lee WILLIE.

No. 81-KA-0242.

Supreme Court of Louisiana.

June 27, 1983.

Rehearing Denied Sept. 1, 1983.

Defendant was convicted before the Twenty-Second Judicial District Court, Parish of Washington, Hillary J. Crain, J., of first-degree murder and was sentenced to death, and he appealed. The Supreme Court, 410 So.2d 1019, conditionally affirmed conviction, vacated sentence, and re-

manded. On remand, the Twenty-Second Judicial District Court, Parish of Washington, Hillary J. Crain, J., found that certain printed note discovered near murder scene did not create reasonable doubt as to defendant's guilt and, after new sentencing hearing, imposed death sentence. Defendant appealed. The Supreme Court, Watson, J., held that: (1) evidence was sufficient to warrant finding that crime was committed "in an especially heinous, atrocious or cruel manner," without need for further definition of that statutory phrase by the trial court; (2) requested special charge as to liability for one who aids and abets in commission of first-degree murder, was not wholly correct statement of law and it was not error for the trial court to refuse to give the charge; and (3) death sentence was not cruel and unusual, excessive, or influenced by passion, prejudice, or any other arbitrary factor.

Affirmed.

1. Criminal Law ⇐1192

Defendant was not entitled, on remand of case after appeal from first-degree murder conviction, to call original 12 jurors to establish what effect certain handwritten note, found near scene of crime, might have had on their decision.

2. Criminal Law ⇐1192

Trial court properly interpreted remand order to obviate need to consider impact that certain handwritten note, found near scene of murder, might have had on jury at original sentencing.

3. Criminal Law ⇐1173.2(1)

Evidence warranted jury's finding that rape and murder, involving pitiless infliction of unnecessary pain on victim, were committed "in an especially heinous, atrocious or cruel manner," and failure of the trial court to instruct jury as to definition of that statutory phrase was insignificant. LSA-C.Cr.P. art. 905.4.

4. Homicide ⇐311

Requested special charge, to effect that, if jury found that defendant did not actually murder victim but was merely principal to the murder, it could not return verdict of death, was not wholly correct statement of law and, hence, there was no error in not giving the special charge. LSA-C.Cr.P. art. 807.

5. Criminal Law ⇐983

Codefendants do not have to receive identical sentences.

6. Criminal Law ⇐1208.1(4)

Before imposing death penalty, jury must consider both crime and particular offender.

7. Criminal Law ⇐983

Death sentence is not necessarily disproportionate because one defendant in factually similar case received life imprisonment.

8. Criminal Law ⇐983

Death sentence imposed upon conviction of first-degree murder was not excessive merely because codefendant, who was also found guilty of first-degree murder, received life imprisonment without benefit of parole, probation, or suspension of sentence. U.S.C.A. Const.Amend. 8.

9. Criminal Law ⇐1213

Fact that defendant was serving three consecutive life sentences in federal prison and that his date of discharge fell in second half of 21st century did not render death sentence imposed by state court unconstitutionally cruel and unusual by reason of asserted inordinate length of time between sentence and execution, given that there was nothing to bar federal authorities from returning defendant to state custody at earlier date. U.S.C.A. Const.Amend. 8; LSA-Const. Art. 1, § 20.

10. Homicide ⇐354

Death sentence imposed upon conviction of first-degree murder was neither excessive nor based on passion, prejudice, or any other arbitrary factor. U.S.C.A. Const. Amend. 8; LSA-Const. Art. 1, § 20; LSA-C.Cr.P. arts. 905.9, 905.9.1.

William J. Guste, Rutledge, Asst. Atty. Dist. Atty., William Reeves, Margaret A. tys., for plaintiff-app

S. Austin McElroy Ford, Franklinton, fo

WATSON, Justice.

Defendant, Robert victed of first degree to death. On initial was conditionally a vacated; and the ca determine whether, near the murder scen doubt about his guil hold a new penalty provided by LSA-C State v. Willie, 410

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On June 2, 1980, were arrested in B related crimes of ag vated kidnapping a committed against Hathaway. On Ju

William J. Guste, Atty. Gen., Barbara Rutledge, Asst. Atty. Gen., Marion Farmer, Dist. Atty., William R. Alford, Jr., Abbott Reeves, Margaret A. Coon, Asst. Dist. Attys., for plaintiff-appellee.

S. Austin McElroy, Covington, Thomas Ford, Franklinton, for defendant-appellant.

WATSON, Justice.

Defendant, Robert Lee Willie, was convicted of first degree murder and sentenced to death. On initial appeal his conviction was conditionally affirmed; the sentence vacated; and the case remanded: (1) to determine whether a printed note found near the murder scene created a reasonable doubt about his guilt; and, if not, (2) to hold a new penalty hearing by a jury, as provided by LSA-C.Cr.P. art. 905.1(B). *State v. Willie*, 410 So.2d 1019 (La.1982).

The facts of the crime are set out in the original opinion as follows:

"On May 28, 1980, at approximately 4:30 a.m., Robert Lee Willie and Joseph Vaccaro offered a ride to the victim, Faith Hathaway, outside of the Lakefront Theatre, a disco in Mandeville, Louisiana. Miss Hathaway, an 18 year old woman, had been celebrating her last night as a civilian before entering the United States Army. Instead of taking the victim to her home in St. Tammany Parish, as she had requested, Willie and Vaccaro took Hathaway to Fricke's Cave, a heavily wooded, secluded gorge south of Franklinton in Washington Parish. Willie or Vaccaro, or both, raped the young woman there. Afterwards, one of the men repeatedly stabbed the victim in the throat while the other held her hands. Hathaway's clothes and purse were found approximately one hundred fifty yards from her body on June 1st, 1980. Her body was discovered on June 4, 1980.

"On June 3, 1980, Willie and Vaccaro were arrested in Hope, Arkansas for unrelated crimes of aggravated rape, aggravated kidnapping and attempted murder committed against persons other than Hathaway. On June 10, 1980, both defendants admitted to police officers that they seized Hathaway but each accused the other of raping her and slashing her throat." 410 So.2d at 1023.

PROCEEDINGS ON REMAND

The trial court conducted an evidentiary hearing in regard to the note found near the scene of the crime. The crime occurred at Fricke's Cave, a "big wash" filled with trees, brush and swamp. (Transcript on Remand, Vol. II, p. 125) After some of Faith Hathaway's clothes were located on a Monday, three private individuals aiding in the search for her body found the note on Tuesday. The body was discovered on Wednesday, "three or four hundred feet south" of the clothes "down toward the swamp". (Transcript on Remand, Vol. II, p. 126) The note is an unsigned and printed message on a scrap of paper which reads "you never find her". Tests revealed no fingerprints. Willie denied printing the note. Willie's counsel did not engage a handwriting expert, because investigation indicated it would be futile. Vaccaro is illiterate. There was no evidence: (1) connecting the note with the crime or Willie; (2) showing who wrote the note; or (3) when it was left.

The trial court, after hearing the evidence, found that the note had no significance and did not create a reasonable doubt about Willie's guilt.

Immediately thereafter, the trial court commenced a new sentencing hearing. A jury was impaneled and evidence was presented by both the state and the defense. Following arguments by counsel and instructions by the court, the jury retired to deliberate. The jury found two aggravating circumstances: (1) that the defendant was engaged in the perpetration or attempted perpetration of aggravated rape; and, (2) that the offense was committed in an especially heinous, atrocious or cruel manner. The recommendation of the jury was that the defendant be sentenced to death.

On appeal from the proceedings on remand, the defendant assigns eight errors by the trial court.[1]

ASSIGNMENT OF ERROR NUMBER ONE

[1] Defendant argues that the court erred in not allowing him to call the original twelve jurors to establish what effect the note might have had on their decision.

The murder occurred in Fricke's Cave, a large gorge. The wadded up note was discovered some distance from the actual murder scene at the bottom of a steep embankment leading to the cave area. The note was found the day before the victim's body was located. Nothing was produced at the hearing which connected defendant or the crime with the note.

There is no authority for recalling jurors to examine them as to the effect some newly discovered article of evidence might have had upon them. On the contrary, the statutory law specifically prohibits impeachment of a verdict by a member of the jury.

"No juror, grand or petit, is competent to testify to his own or his fellow's misconduct, or to give evidence to explain, qualify or impeach any indictment or any verdict found by the body of which he is or was a member; but every juror, grand or petit, is a competent witness to rebut any attack upon the regularity of the conduct or of the findings of the body of which he is or was a member." LSA-R.S. 15:470.

The ruling of the trial court was correct. There is no merit to this assignment.

ASSIGNMENT OF ERROR NUMBER TWO

[2] Defendant argues that the court erred in not considering the possible effect the note might have had at the sentencing phase of the original trial. The ruling of the trial court was precise:

"From my understanding of the ruling of the Supreme Court in this particular case, it is up to this court to decide whether from the evidence presented a reasonable doubt would exist as to the guilt of the accused based upon its note and its effect that it might have on a jury. Based upon the evidence which the court has heard, based upon the evidence the court heard at the original hearing, the court does not think that the note adds anything significant one way or the other to the case of the defendant or, for that matter, to the case of the state. The court, therefore, deems it to be insignificant to not in any way create any reasonable doubt as to the guilt of the accused." Transcript on Remand, Vol. II, pp. 36-37.

The trial court was correct in its appreciation of the remand order: the sentence was set aside for other reasons. There was no requirement that the trial court consider what impact the note might have had on the jury at original sentencing.[2]

This assignment lacks merit.

ASSIGNMENT OF ERROR NUMBER THREE

[3] Defendant contends that the trial court erred in not defining for the jury the phrase "in an especially heinous, atrocious or cruel manner". LSA-C.Cr.P. art. 905.4.

In instructing the jury, the trial court noted that the state relied on two aggravating circumstances. The first, aggravated rape, was defined for the jury but the second, that the crime was committed "in an especially heinous, atrocious or cruel manner" was not defined.

Defendant relies principally on *State v. Sonnier*, 402 So.2d 650 (La.1981). While *Sonnier* indicates that it is desirable for the trial court to instruct the jury about what constitutes a heinous crime, the square holding of that case does not mandate such an instruction. When the evidence reflects that, in fact, there was torture, or the pitiless infliction of unnecessary pain on the victim, the jury has correctly interpreted the meaning of this ag stance.

Faith Hathaway was morning hours on a leng oner, disrobed, forced t blindfolded down a steep the use of sufficient for skin on the inside of her her vaginal region, held spread eagle position and by repeated knife thrusts defendant's own statem the killing took place as

"... Joe [Vaccaro] m ground and then got now, and he just cut just started jugging with it man ... Ju mean jugging her.

"Qus: How many time stabbed her?

"Ans: I don't know n her head lying in his la by the hair. H

"Qus: What were you

"Ans: Freaking out n saying 'this whore ain't telling him come on n just kept jugging her n Hearing, Vol. III, p. 3

The defendant's descri and repeated "jugging" with the evidence in one thologist, Dr. Paul McGe Faith Hathaway was fo back with her legs spread ble and the arms extend The doctor stated that sh held in this position while bly to the point of death legs would not have rema her arms would not have ead; there is a natural the limbs closer to the bo fetal position. The pat that injuries to the inner area and the vaginal forceful rape prior to dea way also had a defensi right hand. Dr. McGeary

1. Although assignments one, two and four were not argued, they will be considered because this case involves a death penalty. *State v. Berry*, 391 So.2d 406 (La.1980).

2. Additionally, the note could not have had any sentencing significance to the jury.

3. "Jugging" in street talk

the meaning of this aggravating circumstance.

Faith Hathaway was taken in the early morning hours on a lengthy ride, held prisoner, disrobed, forced to walk naked and blindfolded down a steep gorge, raped with the use of sufficient force to damage the skin on the inside of her thighs and to tear her vaginal region, held with her legs in a spread eagle position and her throat slashed by repeated knife thrusts. The evidence in defendant's own statement reflected that the killing took place as follows:

"... Joe [Vaccaro] made her lay on the ground and then got his big old knife now, and he just cut her throat and he just started jugging her in the throat with it man ... Just jugging her, I mean jugging her.

"Qes: How many times do you think he stabbed her?

"Ans: I don't know man ... She had her head lying in his lap ... He had her by the hair ... He kept saying ...

"Qes: What were you doing.

"Ans: Freaking out man ... He kept saying 'this whore ain't dead yet'. I kept telling him come on man come on. He just kept jugging her man ..." Original Hearing, Vol. III, p. 385.

The defendant's description of the killing and repeated "jugging"[3] does not comport with the evidence in one respect. The pathologist, Dr. Paul McGeary, testified that Faith Hathaway was found lying on her back with her legs spread as wide as possible and the arms extended over her head. The doctor stated that she must have been held in this position while dying and probably to the point of death. Otherwise, her legs would not have remained extended and her arms would not have been held over the head; there is a natural tendency to draw the limbs closer to the body and curl up in a fetal position. The pathologist confirmed that injuries to the inner thighs, the genital area and the vaginal opening indicated forceful rape prior to death. Faith Hathaway also had a defensive wound on the right hand. Dr. McGeary testified that the victim would have required some minutes to die as a result of the cut throat and said her death would have been a painful one. A chain and medallion were embedded in her neck.

The jury correctly concluded that the crime was a heinous one; it involved the pitiless infliction of unnecessary pain on the victim. Since the jury's finding is supported by the evidence, failure to instruct the jury as to the definition of especially heinous, atrocious or cruel has no significance.

Further, since there was clear proof of one aggravating factor found by the jury, any error in charging the jury as to another factor is harmless. *State v. Narcisse*, 426 So.2d 118 (La.1983).

This assignment lacks merit.

ASSIGNMENT OF ERROR NUMBER FOUR

[4] Defendant argues that the trial court erred in not giving a requested special charge as follows:

"If you find that the defendant did not actually murder the deceased but was merely a principal to the murder, then you cannot return a verdict of death."

A requested special charge shall be given, if it is not included in the general charge, and if it is wholly correct and pertinent. LSA-C.Cr.P. art. 807.

The requested special charge is not wholly correct. A principal in Louisiana who aids and abets in the commission of a first degree murder may be sentenced to death provided he had specific intent to kill or to inflict great bodily harm on the victim. *State v. Sonnier*, supra; *Enmund v. Florida*, —— U.S. ——, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

Therefore, the assignment lacks merit.

ASSIGNMENT OF ERROR NUMBER FIVE

Defendant contends that the trial court erred in imposing an excessive sentence. This argument turns on the fact that co-de-

3. "Jugging" in street talk usually refers to an upward slashing motion with a knife.

fendant Vaccaro was also found guilty of first degree murder but received life imprisonment without benefit of parole, probation, or suspension of sentence.

[5–8] Because a co-defendant received a less severe sentence, Willie's sentence is not ipso facto excessive. Co-defendants do not have to receive identical sentences. *State v. Jessie*, 429 So.2d 859 (La.1983); *State v. Laburre*, 427 So.2d 855 (La.1983); *State v. Rogers*, 405 So.2d 829 (La.1981). Before imposing the death penalty, a jury must consider both the crime and the particular offender. *State v. Sawyer*, 422 So.2d 96 (La.1982); *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). A death sentence is not necessarily disproportionate because one defendant in a factually similar case received life imprisonment. *State v. Taylor*, 422 So.2d 109 (La.1982). While Willie may have been less culpable than his criminal partner, there is nothing to indicate that his role was a subsidiary one. Compare *State v. Sonnier*, 380 So.2d 1 (La. 1979).[4]

This assignment is without merit.

ASSIGNMENT OF ERROR NUMBER SIX

[9] Defendant argues that the trial court erred in imposing a sentence that was cruel and unusual in violation of the Constitutions of the United States and the State of Louisiana.

Because defendant is presently serving three consecutive life sentences in federal prison and his date of discharge falls in the second half of the twenty-first century, it is argued that defendant could not face execution until the year 2080 and the inordinate length of time between sentence and execution make the sentence unconstitutionally cruel and unusual. However, there is nothing to bar the federal authorities from returning Willie to state custody at an earlier date. *Causey v. Civiletti*, 621 F.2d 691 (5 Cir., 1980).

This assignment lacks merit.

4. According to Vaccaro, Willie was the one who raped and killed Faith Hathaway.

DEATH SENTENCE REVIEW

[10] This court is required to review every sentence of death for excessiveness. LSA–C.Cr.P. art. 905.9 provides as follows:

"The Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive. The court by rules shall establish such procedures as are necessary to satisfy constitutional criteria for review."

Three determinations are mandated by Rule 905.9.1:

"Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine:

"(a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and

"(b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and

"(c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

A Uniform Capital Sentence Report with an attached pre-sentence investigation report has been submitted by the trial court. According to these reports, Robert Lee Willie is a twenty-five year old white male who has never been married and has no children. He has a low, normal I.Q. of 81. Willie has a minimal employment record, but a substantial history of criminal activity including simple burglary, motor vehicle violations, criminal damage, aggravated escape, conspiracy to kidnap, kidnapping and second degree murder.[5] At the present time, Willie is in the custody of the federal prison system serving a number of life sentences arising from the kidnapping charges. Defendant is also under indictment for killing a police officer in 1978.

5. Although that offense, the murder of Dennis Hemly, was committed prior to the instant offense, Willie was not convicted until after the current proceedings.

The pre-sentence repo
cludes that Willie constitu
clear threat to society.

PASSION, PREJUDICE
FACTORS

There is no indication o
passion, prejudice or any
entered into the death se
fendant.

AGGRAVATING CIRCU

The two aggravatin
found by the jury were th
committed during the pe
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and that the crime was
especially heinous, atrocio
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until she died.

While any taking of life
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the offender to the pos
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PROPORTIONALITY

The Twenty-Second J
comprised of two parishes
St. Tammany. Defendan
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the state includes inform
first degree murder cases
The memorandum includ
from St. Tammany Par
from Washington Parish.

In only two other case
trick and *State v. Clark*
death sentences been imp
was tried in St. Tamma
and his case has not yet

* Calogero and Dennis, JJ., w
ing.

The pre-sentence report correctly concludes that Willie constitutes a serious and clear threat to society.

PASSION, PREJUDICE OR ARBITRARY FACTORS

There is no indication or contention that passion, prejudice or any arbitrary factor entered into the death sentence given defendant.

AGGRAVATING CIRCUMSTANCES

The two aggravating circumstances found by the jury were that the crime was committed during the perpetration or attempted perpetration of aggravated rape and that the crime was committed in an especially heinous, atrocious or cruel manner. The evidence presented at the sentencing hearing, particularly the statement of the defendant and the testimony of the pathologist, tend strongly to support both circumstances. The victim was unquestionably raped. She was taken, blindfolded and naked, to a remote area where, while spread-eagled on the ground, her throat was repeatedly slashed by one of the perpetrators while the other held her legs spread until she died.

While any taking of life may be described as heinous, the facts of this crime place it in the category contemplated by the legislature when it provided that especially heinous, atrocious or cruel homicides subject the offender to the possibility of capital punishment.

PROPORTIONALITY

The Twenty-Second Judicial District is comprised of two parishes, Washington and St. Tammany. Defendant's trial was conducted in Washington Parish but the sentence review memorandum submitted by the state includes information concerning first degree murder cases in both parishes. The memorandum includes seventeen cases from St. Tammany Parish and fourteen from Washington Parish.

In only two other cases, *State v. Kirkpatrick* and *State v. Clark and Mikell*, have death sentences been imposed. Kirkpatrick was tried in St. Tammany Parish in 1983 and his case has not yet had appellate review. The death sentences of Roy Clark, Jr., and Brent Mikell were vacated and they were sentenced to life imprisonment because their death sentences were imposed under an unconstitutional statute. *State v. Clark*, 340 So.2d 208 (La.1976), cert. denied 430 U.S. 936, 97 S.Ct. 1563, 51 L.Ed.2d 782.

The only case with facts somewhat similar to those here is *State v. Moran*, 370 So.2d 532 (La.1979), a St. Tammany prosecution. Moran forced the victim into his vehicle, drove her from New Orleans to Slidell, raped, stabbed and choked her. The victim actually died of drowning. Moran was sentenced to life imprisonment without benefit of probation, parole or suspension of sentence. However, the defendant was a person with mental problems, and the jury may have concluded that his responsibility was diminished by that fact.

Considering the sentence review memoranda submitted by both the state and the defendant, and the paucity of similar cases, the sentence imposed on the defendant, Robert Lee Willie, cannot be said to be disproportionate.

CONCLUSION

For the reasons assigned, the conviction and sentence of the defendant, Robert Lee Willie, are affirmed.

AFFIRMED.

KEY NUMBER SYSTEM

STATE ex rel. Danny H. GRAFFAGNINO

v.

John T. KING, Secretary of the Louisiana Department of Corrections, J.D. Middlebrooks, Warden.

STATE of Louisiana

v.

Danny H. GRAFFAGNINO.

Nos. 82-KH-0556, 83-KA-0016.

Supreme Court of Louisiana.

June 27, 1983.

Rehearing Denied Sept. 1, 1983.*

Defendant, convicted in nonjury trial of forcible rape was sentenced to eight

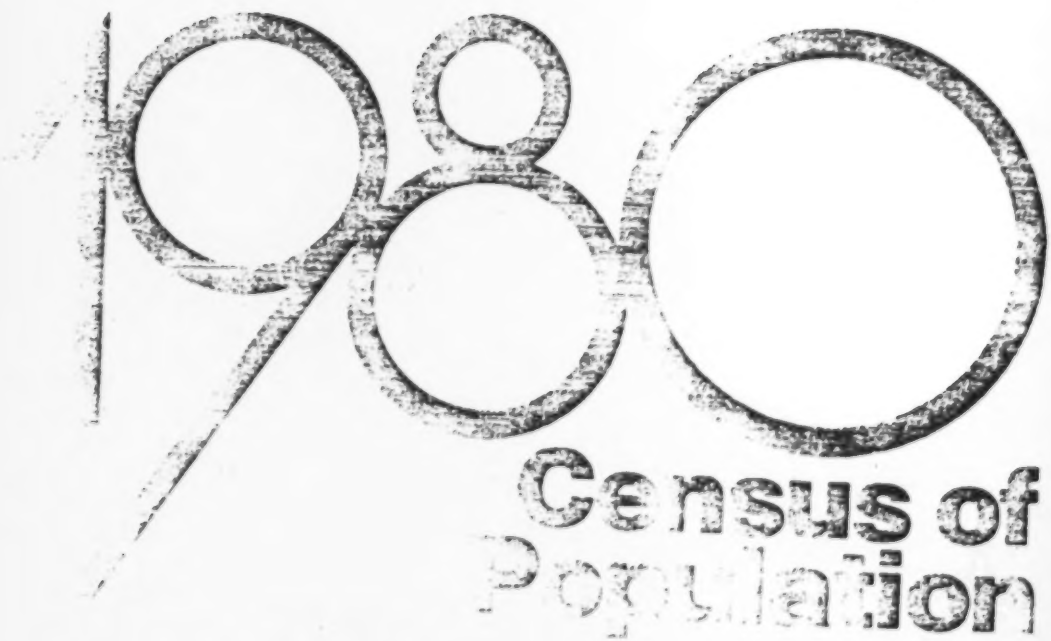
* Calogero and Dennis, JJ., would grant a rehearing.

20

CHARACTERISTICS OF THE POPULATION

Number of Inhabitants

INDIANA



U.S. Department of Commerce
BUREAU OF THE CENSUS

Table 2. Land Area and Population: 1930 to 1980

[Counts relate to parishes as defined at each census. For meaning of symbols, see introduction]

Parishes	1980 land area: Square miles	1980 land area: Square kilometers	Population 1980: Number	Population 1980: Per square mile	Population 1980: Per square kilometer	Percent change: 1970 to 1980	Percent change: 1960 to 1970	1970	1960	1950	1940	1930
The State	44 521	115 310	4 205 900	94.5	36.5	15.4	11.9	3 644 637	3 257 022	2 683 516	2 363 880	2 101 593
Acadia	657	1 701	56 427	85.9	33.2	9.2	4.4	52 109	49 931	47 050	46 260	39 326
Allen	766	1 982	21 390	27.9	10.8	2.9	4.7	20 794	19 867	18 835	17 540	15 261
Ascension	296	767	50 068	169.1	65.3	35.5	32.8	37 086	27 927	22 387	21 215	18 438
Assumption	342	886	22 084	64.6	24.9	12.4	9.2	19 654	17 991	17 278	18 541	15 990
Avoyelles	846	2 192	41 393	48.9	18.9	3.6	0.4	37 751	37 606	38 031	39 256	34 926
Beauregard	1 162	3 012	29 692	25.5	9.9	29.7	19.3	22 888	19 191	17 766	14 847	14 569
Bienville	815	2 112	16 387	20.1	7.8	2.3	-4.2	16 024	16 726	19 105	23 933	23 789
Bossier	845	2 188	80 721	95.5	36.9	22.5	14.3	65 877	57 622	40 139	33 162	28 388
Caddo	894	2 316	252 358	282.3	109.0	9.6	2.8	230 184	223 859	176 547	150 203	124 670
Calcasieu	1 081	2 801	167 223	154.7	59.7	15.0	–	145 415	145 475	89 635	56 506	41 963
Caldwell	541	1 400	10 761	19.9	7.7	15.0	3.9	9 354	9 004	10 293	12 046	10 430
Cameron	1 417	3 670	9 336	6.6	2.5	13.9	18.6	8 194	6 909	6 244	7 203	6 054
Catahoula	732	1 896	12 287	16.8	6.5	4.4	3.0	11 769	11 421	11 834	14 618	12 451
Claiborne	765	1 981	17 095	22.3	8.6	0.6	-12.3	17 024	19 407	25 063	29 855	32 285
Concordia	717	1 857	22 981	32.1	12.4	1.8	10.3	22 578	20 467	14 398	14 562	12 778
De Soto	880	2 280	25 727	29.2	11.3	13.0	-6.1	22 764	24 248	24 398	31 803	31 016
East Baton Rouge	458	1 187	366 191	799.5	308.5	28.4	24.0	285 167	230 058	158 236	88 415	68 208
East Carroll	426	1 103	11 772	27.6	10.7	-8.6	-10.7	12 884	14 433	16 302	19 023	15 815
East Feliciana	455	1 179	19 015	41.8	16.1	7.7	-12.6	17 657	20 198	19 133	18 039	17 449
Evangeline	667	1 728	33 343	50.0	19.3	4.4	0.9	31 932	31 639	31 629	30 497	25 483
Franklin	635	1 646	24 141	38.0	14.7	0.8	-8.2	23 946	26 088	29 376	32 382	30 530
Grant	653	1 690	16 703	25.6	9.9	22.2	2.6	13 671	13 330	14 263	15 933	15 709
Iberia	589	1 526	63 752	108.2	41.8	11.1	11.1	57 397	51 657	40 059	37 183	28 192
Iberville	637	1 651	32 159	50.5	19.5	4.6	2.7	30 746	29 939	26 750	27 721	24 638
Jackson	578	1 498	17 321	30.0	11.6	8.5	0.9	15 963	15 828	15 434	17 807	12 809
Jefferson	347	900	454 592	1310.1	505.1	34.4	62.0	338 229	208 769	103 873	50 427	40 032
Jefferson Davis	655	1 697	32 168	49.1	19.0	8.8	-0.9	29 554	29 825	26 298	24 191	19 765
Lafayette	270	699	150 017	555.6	214.6	34.4	31.9	111 643	84 656	57 743	43 941	38 827
Lafourche	1 141	2 954	82 483	72.3	27.9	19.6	24.5	68 941	55 381	42 209	38 615	32 419
La Salle	638	1 652	17 004	26.7	10.3	27.9	2.2	13 295	13 011	12 717	10 959	11 668
Lincoln	472	1 223	39 763	84.2	32.5	17.6	18.5	33 800	28 535	25 782	24 790	22 822
Livingston	661	1 711	58 806	89.0	34.4	61.1	35.4	36 511	26 974	20 054	17 790	8 204
Madison	631	1 634	15 975	25.3	9.8	6.0	-8.4	15 065	16 444	17 451	18 443	14 829
Morehouse	807	2 089	34 803	43.1	16.7	7.2	-3.7	32 463	33 709	32 038	27 571	22 519
Natchitoches	1 264	3 273	39 863	31.5	12.2	13.2	-1.2	35 219	35 653	38 144	42 997	38 477
Orleans	199	516	557 515	2801.6	1080.5	-6.1	-5.4	593 471	627 525	570 445	494 537	458 762
Ouachita	627	1 623	139 241	222.1	85.8	20.7	13.5	115 387	101 663	74 713	59 168	54 337
Plaquemines	1 035	2 680	26 049	25.2	9.7	3.3	11.9	25 225	22 545	14 239	12 318	9 608
Pointe Coupee	566	1 466	24 045	42.5	16.4	9.3	-2.2	22 002	22 488	21 841	24 004	21 007
Rapides	1 341	3 474	135 282	100.9	38.9	14.6	6.0	118 078	111 351	90 648	73 370	65 455
Red River	394	1 020	10 433	26.5	10.2	13.1	-7.5	9 226	9 978	12 113	15 881	16 078
Richland	563	1 458	22 187	39.4	15.2	1.9	-8.6	21 774	23 824	26 672	28 829	26 374
Sabine	855	2 215	25 280	29.6	11.4	35.6	0.4	18 638	18 564	20 880	23 586	24 110
St. Bernard	486	1 260	64 097	131.9	50.9	25.2	99.0	51 185	32 186	11 087	7 280	6 512
St. Charles	286	742	37 259	130.3	50.2	26.1	39.3	29 550	21 219	13 363	12 321	12 111
St. Helena	409	1 060	9 827	24.0	9.3	-1.1	8.5	9 937	9 162	9 013	9 542	8 492
St. James	248	643	21 495	86.7	33.4	8.9	7.4	19 733	18 369	15 334	16 596	15 338
St. John the Baptist	213	551	31 924	149.9	57.9	34.1	29.1	23 813	18 439	14 861	14 766	14 078
St. Landry	936	2 424	84 128	89.9	34.7	4.7	-1.4	80 364	81 493	78 476	71 481	60 074
St. Martin	749	1 940	40 214	53.7	20.7	23.9	11.7	32 453	29 063	26 353	26 394	21 767
St. Mary	613	1 587	64 253	104.8	40.5	5.8	24.4	60 752	48 833	35 848	31 458	29 397
St. Tammany	873	2 262	110 869	127.0	49.0	74.4	64.5	63 585	38 643	26 988	23 624	20 929
Tangipahoa	783	2 029	80 698	103.1	39.8	22.5	10.8	65 875	59 434	53 218	45 519	46 227
Tensas	623	1 613	8 525	13.7	5.3	-12.4	-17.5	9 732	11 796	13 209	15 940	15 096
Terrebonne	1 367	3 541	94 393	69.1	26.7	24.1	25.1	76 049	60 771	43 328	35 880	29 816
Union	884	2 289	21 167	23.9	9.2	14.7	4.7	18 447	17 624	19 141	20 943	20 731
Vermilion	1 205	3 122	48 458	40.2	15.5	12.5	10.9	43 071	38 855	36 929	37 750	33 684
Vernon	1 332	3 449	53 475	40.1	15.5	-0.6	193.9	53 794	18 301	18 974	19 142	20 047
Washington	676	1 750	44 207	65.4	25.3	5.2	-4.6	41 987	44 015	38 371	34 443	29 904
Webster	602	1 560	43 631	72.5	28.0	9.2	0.6	39 939	39 701	35 704	33 676	29 458
West Baton Rouge	194	502	19 086	98.4	38.0	13.2	14.0	16 864	14 796	11 738	11 263	9 716
West Carroll	360	932	12 922	35.9	13.9	-0.8	-8.1	13 028	14 177	17 248	19 252	12 895
West Feliciana	404	1 051	12 186	30.0	11.6	13.2	-13.2	10 761	12 395	10 169	11 720	10 924
Winn	953	2 468	17 253	18.1	7.0	5.4	2.1	16 369	16 034	16 119	16 923	16 766

No, sir.

MR. ALFORD:

Seriously sir, if - - would the fact that you know Mr. Farmer, would that in any way prevent you from serving as a fair and impartial juror?

MR. MORRIS:

I don't think.

MR. ALFORD:

Thank you.

VOIR DIRE EXAMINATION BY MR. SIMMONS:

I would like to go ahead and start if I might by asking some questions pertaining to the publicity that we have had prior to trial. Mrs. Jenkins, can you tell us now, that you would be able to be as fair and impartial in your deliberation in this trial, were you selected on the jury as you might have been had you never read anything or heard anything or discussed anything pertaining to this case?

MRS. JENKINS:

I would try to be.

MR. SIMMONS:

I know you would make a good faith effort to try to be, and I must press you for a definite answer I am afraid, would you be able to tell this Court that you could definitely beyond any doubt in your mind be able to put these preconceived ideas that you might have and information that you have received from pre-trial publicity where it may be right or wrong out of your mind in order that you might decide this case as fairly and as impartially as

if you had never heard any of it?

MRS. JENKINS:

I think it would be doubtful, that I could do that.

MR. SIMMONS:

You really don't believe you could?

MRS. JENKINS:

I don't believe I could do that.

MR. SIMMONS:

Is that your best honest opinion?

MRS. JENKINS:

That is my opinion.

MR. SIMMONS:

Your Honor, I would submit a challenge for cause.

MR. ALFORD:

Your Honor, the State would agree to excuse the lady by consent.

THE COURT:

You are excused by consent. You may go. Come back Wednesday.

MR. SIMMONS:

Thank you ma'am.

VOIR DIRE EXAMINATION BY MR. SIMMONS:

Mr. Morris, you also indicated that you had read and heard I believe, about this case, have you discussed this with anyone?

MR. MORRIS:

Not in particular, no, sir.

MR. SIMMONS:

Have you for instance, discussed it with a friend in conversation or did you have a conversation with

BY MR. ALEXANDER: I tender the jury.

EXAMINATION BY MR. McELROY:

Q. Mrs. Jenkins, before we get started with the rest of the panel, did I hear you have a conversation with Mr. Farmer, the district attorney, before the proceedings started this afternoon?

BY MRS. ERROL L. JENKINS:

A. Well, I guess you did, but I called the wrong man Mr. Farmer. My son was a classmate of his and I said, "Mr. Farmer," and it was to the wrong man here. That is the kind of conversation it was.

Q. Mr. Farmer responded to you and spoke to you, though, about your son and L.S.U. and all that, and you told Mr. Farmer that you and your son were proud of him and the job he's doing?

A. Well, yes.

Q. Do you think the fact that you're proud of Mr. Farmer and the job he's doing is going to affect your deliberations on this case?

A. Of course not.

Q. I believe you also said that you read just about everything or all the newspaper coverage and you heard about this case on the radio?

A. Yes, I did.

Q. Did you read the facts of this case in the newspapers or hear them on the radio?

A. I read what was in the paper, I did, and what was on the television I heard.

Q. And I believe you said you formed an opinion?

A. Yes.

Q. Did the fact that the source of most newspaper coverage was the district attorney's office and the sheriff's office, did that fact impress you while you were reading the articles?

A. Well, I think the facts that were presented and printed in the paper is what impressed me.

Q. It wasn't so much the source but the facts that were there?

A. Right.

Q. Would you say that you followed this case through the newspapers?

A. I would say whatever was printed in the paper about it I read it.

Q. And you have formed an opinion about that?

A. I did.

Q. And it's your testimony in spite of knowing the facts about this case, all the facts, that you could put that opinion aside and be fair?

A. I feel like I could, yes.

Q. You understand that you would have to ignore everything you read in the newspapers?

A. I understand that.

Q. That you saw on the television and heard on the radio?

A. I understand.

Q. Mr. Williams?

BY MR. ALBERT D. WILLIAMS:

You will come back Wednesday morning. I believe Mrs. Melton was also excused by consent, so she is not involved. If you will wait just one moment, the Bailiff will get your slips of paper with your names on it and he will lead you to where you need to go.

Bailiff.

THE BAILIFF:

Yes, sir.

THE COURT:

Approach the bench.

Are we ready to bring in the panel gentlemen?

MR. ALFORD

The State is ready your Honor.

THE COURT:

Bring in the jury.

(The jury is brought into open Court by the Sheriff.)

THE COURT:

The Sheriff will call fifteen names at random.

(The following list of prospective jurors were called and duly sworn. Number one, Larry Warner; number two, Dymple Seal; number three, Bobby Sue Thomas; number four, Ellie Wayne King; number five, Chess Adams; number six, Joseph I. Byrd; number seven, Jeffrey R. Boone; number eight, Willie Jean Roberts; number nine, Paul Simmons; number ten, Frank J. Rester; number eleven, Samuel G. Seal; number twelve, Joe Matthews; number thirteen, Gary W. Wheat; number fourteen, Dolly W. Sanders; number fifteen, Shirley M. Freeman.)

THE COURT:

MR. ALFORD:

What about T.V., have you seen anything on T.V.?

MISS SEAL:

No, sir.

MR. ALFORD:

Have you formed any opinion as to Joe Vaccaro's guilt or innocence?

MISS SEAL:

No, sir.

MR. ALFORD:

Do you feel you can be fair and impartial and make your decision based solely upon the law and the evidence that you hear in this courtroom?

MISS SEAL:

Yes, sir.

MR. ALFORD:

Miss Thomas, have you read anything?

MISS THOMAS:

Just what was in the Daily News.

MR. ALFORD:

The Daily News?

MISS THOMAS:

(Nods affirmatively.)

MR. ALFORD:

I ask you the same question, have you formed any opinion about the Defendant's guilt or innocence?

MISS THOMAS:

No, sir.

THE COURT:

Miss Thomas, I can't hear you.

MISS THOMAS:

No, sir.

THE COURT:

You have got to speak up where I can hear you so the Court Reporter can hear you.

MR. ALFORD:

You feel that you can make your decision based solely on the law and the evidence?

MISS THOMAS:

Yes, sir.

MR. ALFORD:

Mr. King, have you read anything about this case?

MR. KING:

Yes, sir, the Daily News.

MR. ALFORD:

Any other newspapers you recall reading?

MR. KING:

No, sir.

MR. ALFORD:

What about T.V.? Or radio?

MR. KING:

Some on T.V.

MR. ALFORD:

Do you feel that you can put all of that aside and make your decision based solely upon the law and the evidence that you hear in this courtroom, sir?

MR. KING:

Yes, sir.

MR. ALFORD:

You feel you can be a fair and impartial juror?

to wait on you just a minute. What about you, Mrs. Brumfield?

BY MRS. QUIDA BRUMFIELD:

A. No, I haven't formed an opinion.

Q. Okay. How about you, Mr. Case?

BY MR. GEORGE C. CASE:

A. No, sir, I don't know the incidents at all, just what I read about the trial.

Q. Alright. What about you, Mrs. Thomas?

BY MRS. BOBBYSUE THOMAS:

A I don't know if I can be fair to it or not.

Q. I'm asking you jut right now, you limit and answer. Have you formed an opinion from what you read or might have heard?

A. I have.

Q. You have formed an opinion?

A. Yes.

Q. How about you, Mrs. Roberts?

BY MRS. WILLIE JEAN ROBERTS:

A. I have not.

Q. Okay, how about you, Mrs. Taylor?

BY MRS. DEBORAH C. TAYLOR:

A. No.

Q. Mr. Lee?

BY MR. WALTER L. LEE:

A. No.

Q. Mrs. Burkhalter?

A. No.

Q. Mr. Strahan?

BY MR. DAVID L. STRAHAN:

A. No, sir, I haven't.

Q. Okay, Mrs. Lewis?

BY MRS. HELEN LEWIS:

A. No, sir.

Q. Mr. Thomas?

BY MR. GEORGE E. THOMAS:

A. No.

Q. Now I'm going to direct these questions to you, Mr. Burch and to you, Mrs. Thomas. Could you disregard anything that you might have read, any opinion that you might have formed, listen to the evidence which is given here in the courtroom and regardless of what you might have read outside the courtroom, render a verdict which is fair and impartial to the State of Louisiana and to the defendant in this case, can you do that? That means putting aside what you might have read or heard, listening to the evidence, and deciding this case solely on what you hear in this courtroom? You can do that, Mr. Burch?

BY MR. JAMES RAY BURCH:

A. I believe so.

Q. Can you do that, Mrs. Thomas?

BY MRS. BOBBY SUE THOMAS:

A. Yes, sir.

Q. Now, as I stated before, this defendant is charged

A. Yes, sir.

Q. You realize that an individual who is accused of a crime is entitled to a judgment only on the evidence and testimony in this courtroom?

A. Yes, sir. The only thing I read about it was either in the Thursday or Friday paper about the trial.

Q. Do you recall whether or not the facts were discussed in that article?

A. I just glanced at it. I don't remember the facts.

Q. Mrs. Thomas, I notice that you have a young daughter
BY MRS. BOBBY SUE THOMAS:
A. She's only ten.

Q. Okay. Does that present any problem to you?

A. No, sir.

Q. The nature of the crime that is charged?

A. No, sir.

Q. Would that make you want to serve on this jury possibly?

A. No, sir.

Q. You are aware the only thing you can consider is what goes on in this courtroom?

A. Yes.

Q. You said earlier that you have formed an opinion about this case.

A. Well, since Judge Crain said that, I believe I could be fair.

Q. In spite of the fact that you have an opinion?

A. Yes, sir.

anything. Mr. Hunt, you said you've read all the papers?

BY MR. DARROL L. HUNT:

A. I am not going to say all of them, but several of them.

Q. Well, a number of them?

A. Yes, sir.

Q. Have you seen pictures in the newspaper?

A. I believe so.

Q. And because of what you've read, you say you haven't formed any opinions?

A. No, sir, I didn't.

Q. Do you think because a person has been arrested that would raise an implication?

A. No, sir.

Q. Or the indictment itself?

A. No, sir.

Q. Mrs. Morris, now you say you've read the papers and seen it on television?

BY MRS. JUDY F. MORRIS:

A. Yes, I have.

Q. Have you seen it more than once in the newspaper?

A. Yes, sir.

Q. More than once on television?

A. Yes, sir.

Q. Do you recall whether or not you read the facts of this case?

A. I kept up with it.

Q. So then you know everything the papers have had to say about it?

A. I have read what was in the paper. Now if I could remember it all, probably not.

Q. Okay, let me ask you this, if something that is said here conflicts with either what you read in the paper, are you going to be able to put what you read in the paper out of your mind and just go on what has been said here in court?

A. I could. The papers are not always that accurate.

Q. That's not important, but the fact that you've read it and you remember it.

A. I believe more what was said in here than what I read out of the paper.

Q. Alright. Does the fact that a person has been arrested mean anything to you?

A. No, but they wouldn't have arrested him unless they had some evidence against him in the first place to arrest him.

Q. Now how about the indictment itself?

A. No.

Q. That doesn't mean anything?

A. No.

Q. Now getting from that arrest, police officers are the ones who make arrests.

A. Right.

Q. I'm sure there are going to be some police officers to testify in this case.

Q. Would you expect before voting not guilty that we would have to do something to prove we're not guilty? In other words, could you vote not guilty if we didn't do anything to prove we're not guilty, even if the state failed to prove its case? If they didn't prove to you guilt beyond a reasonable doubt, could you find the defendant not guilty or would you expect him to prove that he wasn't guilty?

A. I would expect him to prove that he's not guilty.

BY MR. McELROY: I would ask that this juror be excused, your Honor.

BY THE COURT: Let me make sure he understands. It's just like I said before, and I want everybody to understand that, what you weigh is the state's evidence. The state has the burden. They present their case first, and if from the evidence which they have presented, they have failed to prove something that is necessary in order to obtain guilt, then at that time the defense has the right not to put on anything, just to rest on the inadequacy of the state's case. Could you in that

event, if that occurred, could you find the defendant not guilty?

A. No.

BY THE COURT: What you're doing is weighing the state's case. You don't weigh the defendant's case until after you weigh the state's case. They have the burden to carry of proof. If they fail to do it, then he doesn't have to do anything, because of this rule of presumption of innocence, you see. Now if they do it, you might expect something else. The first thing--

BY MR. McELROY: Your Honor, I'm going to object to that. Your Honor, if I may object to that statement. I don't think that's correct, and I would note an objection for the record on that last statement.

BY THE COURT: The state has to prove its case beyond a reasonable doubt, and if you feel like they have not done that after they present their case, then he

would be entitled to a verdict of not guilty: in other words, you weigh the evidence presented by the state before you expect anything. Can you do that?

A. I could do that.

BY THE COURT: You would not necessarily expect him to do anything, you would weigh the evidence of the case of the state as to what they presented?

A. Yes.

BY THE COURT: Do all of you understand that?

BY MR. McELROY: I'm going to continue my objection as to this juror, your Honor.

BY THE COURT I overrule the objection.

BY MR. McELROY: Please note my objection.

Q. Mr. Pigott, would you expect in any event that Mr. Willie would have to prove anything?

BY MR. ROBERT R. PIGOTT, II:

A. No, sir.

Q. Mr. Burch?

BY MR. JAMES RAY BURCH:

A. No, the state would have to.

BY MR. HOMER O. BRANCH, JR.:

A. Yes, I followed the case as close as the paper come out with it.

Q. Okay, you've read the articles?

A. Yes, sir.

Q. You know the facts of this case? And have you formed any opinion as a result of reading it?

A. I thought it was pretty terrible what I seen.

Q. Then you have formed an opinion?

A. Well, I don't --

Q. You said it was pretty clear what was done. That sounds like an offense.

BY MR. FARMER: That was not his words. He said it was pretty terrible.

BY THE COURT: That's what he said, and I want to know whether he formed an opinion to the guilt or innocence of the accused, and I don't want to know what the opinion is.

BY MR. McELROY: I'm not particularly concerned with that either, your Honor.

BY THE COURT: Well, let's get it straight.

Q. You read the articles. You do have an opinion about what happened.

A. I guess I made up my mind.

Q. And does that opinion concern guilt or innocence?

A. It wasn't, well, if the evidence comes out in the trial and all that I could go whichever way the evidence could point.

Q. Are you telling me that you could ignore what you've read

after following this case closely, as you said?

A. Yes, sir, I am pretty sure.

Q. I don't mean to belabor the point, but at this point pretty sure isn't really good enough.

A. Well, I guess you would say I have an opinion then.

Q. You do have an opinion as to the guilt or innocence?

A. Yes.

BY MR. McELROY: Your Honor, I ask that this juror be excused.

BY THE COURT: The question is not only if you have an opinion but can you, and we need to know this, and you need to search your own mind and tell us this, can you put aside any opinion that you might have, put aside any recollection of any facts that you might have read, listen to the evidence which is presented from the witness stand, and render a verdict based solely on that evidence.

A. I can do that.

BY THE COURT: I will deny it.

BY MR. McELROY: Note my objection please.

Q. Let me ask you this, Mr. Branch, now that we've gone through this little thing, can you forget this little banter that we've had and decide the case on the facts?

A. Yes, sir.

Q. Mrs. Edwards, you've indicated that you've read this in the newspapers?

(The prospective jurors nods in the affirmative.)

MR. ALFORD:

Your Honor, I don't believe it is a good challenge for cause. I believe the jurors just didn't understand.

MR. SIMMONS:

In view of the responses, I would like to ask a couple of questions your Honor.

THE COURT:

All right.

VOIR DIRE EXAMINATION BY MR. SIMMONS:

Nobody is here to try to trick you, ladies and gentlemen. I just want to ask you to make sure we have an understanding because you will have to have an understanding if you are going to do justice in this case. Let me give you another example, let's say Mr. Vaccaro was there and let's say he is drunk or on pills or whatever, and not himself, and let's say that Robert Willie says hold her hand and Joe doesn't know what is going on, he holds her hand and Mr. Willie comes up to her and kills her. Mr. Vaccaro didn't know he was going to kill her.

My question to you is, in that situation, would you automatically vote first degree murder on a case like that?

(The prospective jurors nods negatively.)

MR. SIMMONS:

You would not?

(The prospective jurors nods negatively.)

MR. SIMMONS:

By the same token, in the armed robbery, let's take

The burden of proof is on the State therefore to prove the guilt of Joseph Vaccaro beyond any reasonable doubt. Not only must they show that Joseph Vaccaro was there and Joseph Vaccaro might have killed her or taken part in it, not only must they prove that he probably took part in it or killed her, they must prove beyond any reasonable doubt that he did do it.

Now again, it is not enough for the State to prove that a crime was committed. It is not enough to prove that Robert Willie killed Faith Hathaway, but the State must prove that Joseph Vaccaro was a principal and that he intended it and that he participated in it and that he is guilty himself. I want to read to you a couple of Statutes. Did ya'll get to hear the statutues as we read them before? Did everybody hear what we were reading?

(The prospective jurors nods affirmatively.)

MR. SIMMONS:

Then I am not going to belabor that, we have read a couple of things to you, basically the difference between first degree murder and second degree murder and I will ask Mr. Alford to object if I slip up some how and don't give you this straight. I want you to know it straight.

First degree murder would be involved where Joe Vaccaro intended for her to die or to receive a serious great bodily harm and he was involved in an armed robbery and aggravated rape or an aggravated kidnapping at the same time. However, second degree murder would be involved where he may have been involved in some

Yes, sir.

THE COURT:

Before you go further, I need to call six additional jurors for downstairs. Let me interrupt you just one moment.

Sheriff, call six additional jurors to go downstairs with Judge Crain's courtroom. If you have already been down there and your name has been in the box and it comes up again, please let me know. We need six additional people to go downstairs.

(The following names are called to go to Judge Crain's courtroom. Number one, Julius A. Savant; number two, Craig Thomas; number three, Mrs. Burt D. Sharp; number four, Don E. Brown; number five, Morris Jefferson; number six, Walter J. Fournet.)

VOIR DIRE EXAMINATION BY MR. SIMMONS:

I won't be much longer, I know you are tired of listening to me. In a little while the State is going to make an opening statement which they are required to do and which they must do in order to tell you what they intend to prove. If they don't tell you everything, they can't do it, so they have to tell you, they have to tell you what they intend to prove. The Defense may put on an opening statement. We haven't decided whether we will or not, but we can if we want to. So whatever Mr. Alford or I or Mr. Ford or any of us say, the lawyers speaking up here, while we want you to pay attention to us, while we are trying to do our job, it is not evidence. The Judge is going to instruct you on the law and we are going to submit

BY MR. McELROY: The reason I don't have any preemptory challenges left--

BY THE COURT: You've exercised all your preemptory challenges.

BY MR. McELROY: I realize that.

BY MR. FARMER: Mr. Fournet is acceptable to the state, your Honor.

BY THE COURT: You have no challenge for cause you want to submit at this time.

(Mrs. Burt D. Sharp, Mr. Thomas Craig Wilkins, Mrs. Hazel Lee Edwards, Mr. Ronald G. Gill, Mr. Julius A. Savant, Mr. William Brumfield, Mr. Vernor E. Carr, Mr. Walter J. Fournet, being duly sworn as jurors.)

BY THE COURT: We will pick an alternate. I will give you one challenge each.

BY MR. FARMER: Start with Mr. Jefferson?

BY THE COURT: Mr. Jefferson.

BY MR. FARMER: State thanks but excuses Mr. Jefferson.

BY THE COURT: Have you been upstairs?

BY Mr. MORRIS JEFFERSON:

A. I've been up there, but they didn't choose me.

BY THE COURT: You haven't been called?

The date is 6-10-80, the time is 7:00 P.M. We are in Texarkana, Arkansas Police Department. This is an oral interview by Investigator Micheal Varnado with the D.A.'s Office and Donald Sharp with the St. Tammany Parish Sheriff's Office. This will be an interview with Robert L. Willie.

Ques: How old are you ?
Ans: 22.

Ques: And, your date of birth?
Ans: January 2nd, 1958.

Ques: Did you go to school?
Ans: Yes sir.

Ques: How much education have you got?
Ans: All through the ninth grade.

Ques: Went up to the ninth?
Ans: Yes sir.

Ques: I am showing you a consent to questioning form, it says... PD SF May of 1972, and on top of it... Texarkana, Arkansas Police Department. It is advising you of your rights. Are you aware of your rights?

Ans: Yes sir.

Ques: Do you want an attorney with you at this time?
Ans: No.

Ques: I want you to start from the beginning.. and this is on the Hataway girl, the girl that came missing from Mandeville, and I want you to be as detailed as you can.. and take me step by step as to what happened?
Speak up as loud as you can.

Ans: Well... we got load on valiums, run up some valiums.. and road around and went to Mandeville... picked this girl up...I asked her did.. she was walking on the side of the road and I asked her.. I said..."do you want a ride?", she said yes. So, she got in the middle of the seat between me and Joe . I asked her where she lived, she told me somewhere, I forgot,but anyway, I told Joe how to get there and then we pulled over on the side of the road and he got out and I got out and he went to the back of the car and he says.. ah.." Do you know where we can go fuck this whore?" I said "She's going to start freaking out man, if you don't bring her home", he said " don't worry about it" you know... and I said " I know a place that you can take her". So, we rode around and went up to Prickle Cave, and Joe blindfolded her and went down in the bottom of the hill, Joe made her lay on the ground and then got his big old knife now, and he just cut her throat and he just started jugging her in the throat with it man.. just jugging her, I mean jugging her.

Ques: How many times do you think he stabbed her?
Ans: I don't know man.. she had her head lying in his lap..he had her by the hair... he kept saying....

Ques: What were you doing?
Ans: Freaking out man.. he kept saying "this whore aint dead yet". I kept telling him, come on man, come on". He just kept jugging her man and then he said " We've got to get the fuck out of here".

Ques: Did you touch the girl?
Ans: I grabbed her hands when she started to get up after he done jugged her in the throat two or three times.

SIGNED: Robert L Willie Page _ of _ pages

Ques: Are you sober now?
Ans: Yes.

Ques: Have you had any drugs in the last day or two?
Ans: No.

Ques: What route did you all take up there to Prickle's Cave?
Ans: Folsum Highway...I believe...or up Lee Road and cut through Folsum Road... I believe that's how we went up there.

Ques: Up Lee Road?
Ans: Yes.

Ques: Did Joe Rape this girl?
Did he fuck her?
Ans: Yes.

Ques: He did??
Ans: Yes, he fucked her.

Ques: When did he fuck her?
Ans: When we got up there.

Ques: Was she trying to resist?
Ans: Naw.

Ques: She wasn't.
Ans: No, she was loaded.

Ques: When you first went down in there, did ya'll ...did you take off any of her clothes before ya'll got the the spot she laid down?

Ans: She had her clothes.. she had her pants off before we went down in there.

Ques: Do you remember where ya'll left the purse?
Ans: I don't know... Joe..she was asking me what we were going to do with her.. I kept telling her I didn't know and Joe had some kind of cosmetic thing.. a plastic bag she had all of her makeup and stuff in.

Ques: Do you remember what color purse she had?
Ans: No, I don't... all I know I didn't kill her man..I know that I'll take a Lie Detector Test for that.

Ques: What kind of vehicle were you all in when you went down there?
Ans: A Ford, blue Ford car.

Ques: Have you used any kind of force or threats ...?
Ans: Naw, you aint used nothing on me.. man.

Ques: You are giving this statement on your free will?
Ans: I'm just giving this statement on my own free will..'cause everybody's trying to put the blame on me and I just want to get everything straighten out.

Ques: You want to just get it off your mind?
Ans: That's it. I know that I didn't kill her, I know that much.

Ques: The clothes that Joe had on that night.. and you, did you all get any blood on them?
Ans: I didn't get any on mine.

Ques: Did Joe have any blood on him?
Ans: I couldn't say man... I was kind of..

SIGNED: Robert L. Willis _____Page _ of _ pages

Ques: And then you all walked down the hill?
Ans: Yes.

Ques: And then you went by a log; do you remember the log where the clothes were?
Ans: I don't remember.

Ques: After you got to where Joe killed the girl, can you describe the ground around there; was it sandy was it pretty thick in there?

Ans: It don't have no brush around there, its just little small oak trees its deep, you know. .. a little sand here with grass in it.

Ques: After you got there, Joe made her ..????
Ans: Sit down on the ground.

Ques: She was still blindfolded at that time?
Ans: Yes.

Ques: Did she sit down on anything?
Ans: Ah..

Ques: Was she nude at this time?
Ans: Yes.

Ques: She didn't have any clothes on?
Ans: Yes. She wanted her pants or something to sit on but ah..

Ques: Did he let her sit on her pants?
Ans: No. he didn't.

Ques: What did he say to her?
Ans: He said " sit down bitch".

Ques: Was he holding the knife on her at that time?
Ans: No, he didn't bring the knife out man.. until he got in the back of her and kneeled down behind her. Then he brought that big old bowie knife out.

Ques: He kneeled down behind her?
Ans: Yes.

Ques: What happened than?
Ans: He grabbed her hair and cut her throat.. man.. blood was just ....

Ques: He grabbed her hair from behind her?
Ans: Naw, he had it on the side. But he was behind her jugging her.

Ques: He came up from behind her?
Ans: Yes.

Ques: And, after he cut her, he started jugging her?
Ans: Yes. She started moving all kinds of ways and he just started jugging her in her throat... and he kept saying.." the fucking whore aint dead man" and I kept saying."uuuuon man, let's go let's go"

Ques : Did you have to hold the girl down?
Ans: Well, she went to jump up one time but man..

Ques: After he cut her?
Ans: Yes, I reckon reflex you know...

Ques : Is that when you grabbed her?
Ans: Yes, I said come on now an' behave.

Ques: You grabbed her by the wrist?
Ans: .... she said ah.. she said something.. why don't ya'll go on.

SIGNED: Robert L. Willis Page _ of _ pages

Ques: This was after she was cut?
Ans: Yes. She said " why don't you all go on, and let me die by myself"

Ques: Joe just kept going?
Ans: Yes, he kept saying " this whole aint dead man" and he just started jugging her, he was jugging the knife all the way down man.

Ques: Do you remember her having anything around her neck? A necklace?
Ans: Naw , I didn't pay no attention when he cut her man...

Ques: Do you remember her having in jewelry?
Ans: Naw.

Ques: After all that, what did you all do then?
Ans: We left man.. I got the hell out of there.

Ques: You all got back into the car?
Ans: Yes.

Ques : And nobody said anything at all while driving down the road?
Ans: No, I was just freaking out.

Ques: Did you all leave a note?
Ans: I was just freaking out.

Ques: Did you leave a note?
Ans: Uh huh.

Ques: Did he leave a note?
Ans: Naw,he can't write man.

Ques: After you all got back out of the cave you all left and went straight back to Covington?

Ans: Yes.

Ques: And.. what did you do then?
Ans: He dropped me off and I reckon he went over to his momma's house.

Ques : Where did he drop you off at?
Ans: At my aunt Bessie's.

Ques : To this day, he hadn't mention it to you again?
Ans: No. I know I didn't kill her through man.. I'll take a lie detector test...

SIGNED ______________________
DONALD SHARP
DEPUTY, ST. TAMMANY PARISH S. O.

SIGNED: [signature]
MICHAEL VARNADO
INVESTIGATOR, D. A. 'S OFF

SIGNED: Robert L. Willie
ROBERT L. WILLIE

DATE: __________,19__

DATE: 6-11 ,1980

Witness: Robert D. Lambert, Special Agent, FBI 6/11/80, P.O. Box 891 Texarkana, Ark 75502
DATE: 6-11 ,1980

TPC Ronald L. Pierce
La. State Police

Carl M. Mayo
Deput M. I. Marshal 6/11

Gail L. Pinkston
Notary
Signed 6.11.80
Expires 9-21-81
Miller County, ARK

Transcribed by Jessie W
293 Inghram
Texarkana,
Phone: 772-3648

show that Faith Hathaway was killed. As distasteful as you might find it, it is your sworn duty to examine the facts in this particular case and not go into that jury room and decide this case on emotion. You have to find that the State of Louisiana has proven each and every element of the crime charged beyond a reasonable doubt, and if you don't so find, it is your duty to return a verdict of guilty to a lesser charge or not guilty. As much as your sympathy is right now with Faith Hathaway and her family, it is your sworn duty to ignore that and fairly judge the facts. We know that on the morning of May 28th of this year Faith Hathaway was killed and that Robert Willie was there. I don't think from the evidence we have that we can determine with any accuracy of the time of day this took place. The only person who told us what time he thought it was was on that particular day high on valium, L.S.D. and beer. How accurate can his recollection of the time be in this particular case? We also know that Joseph Vaccaro is the man who cut Faith Hathaway's throat. That is the evidence in this case. Mr. Alexander interprets that it was Robert Lee Willie, that's one thing, but the facts are in this case that you have before you that Joseph Vaccaro is the one who cut that girl's throat. We know Robert Willie was involved, but what exactly was his involvement? What does the evidence that we have indicate? The evidence is that when Faith Hathaway left work, she changed her clothes. W e do n't know whether she did it specifically at that point or sometime later in the evening. The clothes that she wore to work were put in that purse that Mr. Alexander showed you. She changed into a pair of jeans, and we really don't

that the next day they were together. The question, of course, arises, well, who put it into the truck? I submit that Joe Vaccaro did. The only evidence we have in this case is that Joe Vaccaro had that knife. He was the one who Eddie Sharp gave it to, and Robert Willie told them it was in the truck, probably in the truck. We spoke before about an atmosphere a desire to see Robert Willie convicted as charged. I'd like to go over another indication of that. Mike Varnado and Donald Sharp told us how they took the statement from Robert Willie. They remembered advising him of his rights, taking the statement, the whole thing, but they didn't remember being told that Robert Willie wanted to talk to a lawyer before he was questioned. Yet Donald Lambert of the F.B.I., who has got no interest in the outcome of this case, recalls specifically that he told them that Robert Willie wanted a lawyer before he spoke to anybody. Donald Sharp couldn't remember anything about that. Yet on cross examination at an earlier time Donald Sharp remembered it. On cross examination, Mike Varnado said he remembers that Robert Willie didn't want to make a statement to anyone, but he didn't know how he found that out or whether he just felt it or what. Were they lying? I don't think so. I think their recollection of the facts is geared towards one thing, to make sure that Robert Willie is convicted as charged.

If anything I have said or anything I will say offends you, please don't, don't hold that against Robert Willie. He's got no control over what I say up here. This is me speaking, not Robert Willie. Quite frankly, the evidence indicates that just prior to Joseph Vaccaro's killing Faith Hathaway, Robert Willie thought he was going to have his turn with Faith

Hathaway. The pants were folded under her and she was down on the ground. Robert Willie, as you heard the testimony, was standing in front of her. Totally and unexpectedly, Joseph Vaccaro pulls out the knife that Eddie Sharp had given to him and starts cutting Faith Hathaway. Robert Willie was under the influence of drugs. You or I probably would have punched, or even killed Joe Vaccaro at that point. But then you and I are not under the influence of drugs. What Robert Willie did and says offends the hell out of you. I can tell that by looking at you. We can't make that go away. It happened. But Robert Willie didn't kill Faith Hathaway. Robert Willie didn't know that Joseph Vaccaro was going to kill Faith Hathaway. He acted in a manner that offends everybody, but he's not guilty of murdering Faith Hathaway. To find Robert Lee Willie guilty, you have to find that he had the specific intent, and the judge is going to tell you what that is, to kill. I submit to you based on the evidence you cannot find that. Thank you.

BY MR. ALEXANDER: Ladies and gentlemen of the jury, this is my last chance to talk to you, and I'm going to be as brief as possible, but I feel there are a few things that really need to be brought out at this time of the trial. First of all, let's get rid of this business about Robert Lee Willie being full of valium, full of L.S.D., full of beer. The defense wants you to believe that he didn't know what he was doing and therefore he couldn't form the specific intent to qualify under the first degree murder statute.

Well, there's two things I want to remind you of about that. Okay? Number one, nobody poured any beer down his throat, nobody poured any valiums down his throat, nobody

Robert Willie and Joe Vaccaro were her judges and jury and executioner. I think that no matter how Mr. McElroy would like you to beget Dr. McGeary's testimony, Dr. McGeary's testimony, once you establish that Robert Willie was on the scene, and that's really the only significance from the standpoint, from our standpoint of the state, that's the only significance, it clearly establishes that he was on the scene, and from there on all you need is Dr. McGeary, that's all you need. Because the facts speak for themselves as to what happened, and this is not speculation as to what happened. You've got to remember Dr. McGeary's testimony. Two people held that girl until she was dead or unconscious and near dead. Now if that's not intentional and if that's not cold blooded, then what is it? There's no other explanation for it. That's exactly what it is. Now let me ask you this, and this is in the law.

Suppose that through an act of God that one of you at the moment that Robert Willie is between her legs and that Joe Vaccaro is holding her hands, that one of us walked up on that scene, nude girl, blindfolded, probably screaming, scared to death, and God willed it that we had a gun, I think almost everyone of us without hesitation would have blown them both away and that we'd have grabbed that little girl and if we had a blanket we'd have wrapped her, and we would have hugged her, and we would have been proud of ourself that we saved her life, that we kept her from being raped, and we wouldn't have had one bit of remorse that we used the gun and we'd have been right under the law. The law says that we would have been right to do exactly what we did. Well, if we have that right and the law says that we have that right, as it does, then we also have the right to impose the ultimate penalty on Robert Willie. The state has alleged that the

kind of human being is that? That's the type of human being that when convicted of first degree murder and when the evidence is as strong as it is in this case, that the only punishment is death. And why? Why is that? Why is the only puhishment death? Because if we as a community, if you as a group of citizens are going to say that life is valuable, you are going to say that Faith Hathaway had a right to live. If you believe that that little girl had a right to live, a right to go about her life, she may have never married a senator or president, but she was trying to do something constructive with her life. She was going in the service. It's not easy for somebody to do. But if you are going to say that she had a right to live, which she certainly did, and that Robert Willie didn't have a right to take her life, then as punishment for Robert Willie taking her life, you're going to give him life, where is the justice of it? If

you're going to hold anything holy about the life of Faith Hathaway, if you're going to say that it has any value at all, you've got to say the death penalty, because otherwise you're saying, Robert Willie, your life is more valuable than Faith Hathaway's, your life means more than Faith Hathaway. I certainly hope that you can't say that. The evidence certainly doesn't indicate that his life is even close to the value to that of Faith Hathaway, but even being putting a value on it, the two lives. He took her life. He deserves that.

BY THE COURT: Ladies and gentlemen, this defendant has been found guilty of first degree murder and you must now decide whether the defendant must be sentenced to death or to life imprisonment without benefit of parole, probation or suspension of sentence. In reaching your decision regarding the sentence to be imposed, you should be guided by these instructions. You are required to

Death sentence for first-degree murder offenses, which involved several aggravating circumstances and which were committed by 26-year-old defendant with a prior criminal record, was not disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. State v. Sonnier, Sup.1979, 379 So.2d 1336, appeal after remand 402 So.2d 650.

In fulfilling its responsibility of reviewing jury's recommendation of death penalty, Supreme Court must conduct an independent review, regardless of the failure of defense counsel to object to possible error, to determine whether passion, prejudice or any arbitrary factor has contributed to the recommendation of death penalty. Id.

Death sentence for two counts of first-degree murder was not excessive, in view of indication that it was not imposed under influence of passion, prejudice or any other arbitrary factors, that there were one or more statutory aggravating circumstances and that the sentence was not disproportionate to the penalty imposed in similar cases. Id.

On consideration of aggravating and mitigating circumstances, imposition of death penalty for first-degree murder was not excessive. State v. Prejean, Sup.1979, 379 So.2d 240, certiorari denied 101 S.Ct. 253, 449 U.S. 891, 66 L.Ed.2d 119, rehearing denied 101 S.Ct. 598, 449 U.S. 1027, 66 L.Ed.2d 489.

In deciding whether death sentence is excessive, Supreme Court must consider whether sentence is imposed under influence of passion, prejudice or any other arbitrary factor; whether evidence supports jury's finding of aggravating circumstance under C.Cr.P. art. 905.4 and whether sentence is disproportionate to penalty imposed in similar cases, considering both crime and defendant. Id.

2. Objections

By failure to object at trial that none of three aggravating circumstances found by the jury was supported by the record, defense counsel did not waive his objection, as the Supreme Court was empowered by this article to undertake an independent review of all death sentences. State v. Culberth, Sup.1980, 390 So.2d 847.

3. Reference by prosecutor to review

There is no absolute prohibition against prosecutor's reference in closing argument to commonly known fact that this article requires Supreme Court to review every death sentence, and such a reference does not necessarily serve to induce a juror to discard his responsibility, and thus issue should be determined in each individual case by viewing reference to appellate review in context in which remark was made. State v. Berry, Sup. 1980, 391 So.2d 406, concurred in part, dissented in part 396 So.2d 880, certiorari denied 101 S.Ct. 2347, 451 U.S. 1010, 68 L.Ed.2d 863.

Prosecutor's closing argument, which told jury that death penalty scheme under C.Cr.P. art. 905 et seq. provided adequate safeguards against arbitrary imposition of death sentence, and that weighing of all considerations enumerated in C.Cr.P. art. 905.4 and 905.5 warranted imposition of death penalty in instant case, did not serve to lessen significance of jury's role in overall scheme, and thus prosecutor's reference in closing to fact that this article requires Supreme Court to review every death sentence did not require reversal. Id.

When prosecutor's reference to appellate review of death sentence conveys message that jurors' awesome responsibility is lessened by fact that their decision is not the final one, of if reference contains inaccurate or misleading information, then defendant has not had a fair trial in sentencing phase, and penalty should be vacated. Id.

4. Presumptions and burden of proof

In reviewing a capital case in which an offender's potential for future release has been interjected into the proceedings by the State or the trial court, the Supreme Court must presume that a death sentence was imposed upon the influence of an arbitrary factor unless the record clearly indicates that the jury was properly informed of its duty and admonished to disregard the improper remarks, and the record indicates that the jury heeded the admonition. State v. Lindsey, Sup. 1981, 404 So.2d 466.

Supreme Court Rule 28

Rule 905.9.1. Capital sentence review (applicable to La.C.Cr.P. Art. 905.9)

Section 1. Review Guidelines. Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine:

(a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and

(b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and

(c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Section 2. Transcript, Record
transcript of the sentencing hearin
be transmitted to the court with
transmitting the record for appea

Section 3. Uniform Capital S

(a) Whenever the death p
complete and file in the rec
"B"). The trial court may c
department of probation and
information needed to compl

(b) The trial judge shall c
report to be attached to the
inquire into the defendant's
and background, education, e
matters concerning the defe
below.

(c) Defense counsel and
completed Capital Sentence I
be afforded seven days to fi
opposition shows sufficient g
resolve any substantial facti
tion, if any, shall be affiche

(d) The preparation and
pending completion of the I

Section 4. Sentence Review

(a) In addition to the brie
the district attorney and t
dressed to the propriety of
ble, to that required for bri

(b) The district attorney
the time provided for the de
shall include:

i. a list of each first
imposed after January
crime convicted, senter
record concerning the

ii. a synopsis of the
in the instant case;

iii. any other matte

(c) Defense counsel shall
time for the state to file its
to the state's memorandum

Section 5. Remand for Exp
for the development of facts r

Added Nov. 22, 1977, eff. Jan. 1, 1

Law Review Commentaries

United States Supreme Court ar
ishment: Uncertainty, ambiguity
control. Michael W. Combs, 7
Rev. 1 (1980).

Section 2. Transcript, Record. Whenever the death penalty is imposed a verbatim transcript of the sentencing hearing, along with the record required on appeal, if any, shall be transmitted to the court within the time and in the form, insofar as applicable, for transmitting the record for appeal.

Section 3. Uniform Capital Sentence Report; Sentence Investigation Report.

(a) Whenever the death penalty is imposed, the trial judge shall expeditiously complete and file in the record a Uniform Capital Sentence Report (see Appendix "B"). The trial court may call upon the district attorney, defense counsel and the department of probation and parole of the Department of Corrections to provide any information needed to complete the report.

(b) The trial judge shall cause a sentence investigation to be conducted and the report to be attached to the uniform capital sentence report. The investigation shall inquire into the defendant's prior delinquent and criminal activity, family situation and background, education, economic and employment status, and any other relevant matters concerning the defendant. This report shall be sealed, except as provided below.

(c) Defense counsel and the district attorney shall be furnished a copy of the completed Capital Sentence Report and of the sentence investigation report, and shall be afforded seven days to file a written opposition to their factual contents. If the opposition shows sufficient grounds, the court shall conduct a contradictory hearing to resolve any substantial factual issues raised by the reports. In all cases, the opposition, if any, shall be attached to the reports.

(d) The preparation and lodging of the record for appeal shall not be delayed pending completion of the Uniform Capital Sentence Report.

Section 4. Sentence Review Memoranda; Form; Time for Filing.

(a) In addition to the briefs required on the appeal of the guilt-determination trial, the district attorney and the defendant shall file sentence review memoranda addressed to the propriety of the sentence. The form shall conform, insofar as applicable, to that required for briefs.

(b) The district attorney shall file the memorandum on behalf of the state within the time provided for the defendant to file his brief on the appeal. The memorandum shall include:

i. a list of each first degree murder case in the district in which sentence was imposed after January 1, 1976. The list shall include the docket number, caption, crime convicted, sentence actually imposed and a synopsis of the facts in the record concerning the crime and the defendant.

ii. a synopsis of the facts in the record concerning the crime and the defendant in the instant case.

iii. any other matter relating to the guidelines in Section 1.

(c) Defense counsel shall file a memorandum on behalf of the defendant within the time for the state to file its brief on the appeal. The memorandum shall address itself to the state's memorandum and any other matter relative to the guidelines in Section 1.

Section 5. Remand for Expansion of the Record. The court may remand the matter for the development of facts relating to whether the sentence is excessive.

Added Nov. 22, 1977, eff. Jan. 1, 1978.

Law Review Commentaries

United States Supreme Court and capital punishment: Uncertainty, ambiguity, and judicial control. Michael W. Combs, 7 Southern U.L. Rev. 1 (1980).

Notes of Decisions

Aggravating circumstance
- In general 2
- Heinous, atrocious or cruel manner 3
- Risk to more than one 4
- Unrelated murder 2.5

Comparative review 7

Construction and application ½